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**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPERIOR COURT**  
**OF THE**  
**CITY OF NEW YORK.**

**SAMUEL JONES AND JAMES C. SPENCER,**  
**REPORTERS OF THE COURT.**

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*Rec. Oct. 16, 1893*

JUDGES  
OF THE  
SUPERIOR COURT  
OF THE  
CITY OF NEW YORK

DURING THE TIME OF THIS VOLUME OF REPORTS.

---

JOHN SEDGWICK,  
CHIEF JUDGE.

JOHN J. FREEDMAN,  
CHARLES H. TRUAX,  
PHILIP H. DUGRO,  
DAVID McADAM,  
HENRY A. GILDERSLEEVE,  
JUDGES.



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A BRIEF RECORD  
OF THE  
SUPERIOR COURT  
OF THE  
CITY OF NEW YORK.

FROM THE ORGANIZATION OF THE COURT TO  
JANUARY 1, 1893.

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1828 to 1850.

The Superior Court was organized by the Act of March 31, 1828, and consisted of three Justices appointed by the Governor, with the consent of the Senate, who held office, respectively, for five years.

The first Justices appointed were

SAMUEL JONES,  
JOSIAH OGDEN HOFFMAN, and  
THOMAS J. OAKLEY.

SAMUEL JONES was appointed Chief Justice.

The Court remained unchanged until 1837 (the incumbents having been re-appointed from time to time), when upon the death of Justice JOSIAH OGDEN HOFFMAN, DANIEL B. TALLMADGE was appointed to fill the vacancy, and remained in office until his death, in October, 1846, when Hon. AARON VANDERPOEL was appointed to fill the vacancy.

At the time of the adoption of the Constitution of 1846, the Court consisted of

SAMUEL JONES, Chief Justice,  
THOMAS J. OAKLEY, and  
AARON VANDERPOEL, Justices.

Chief Justice SAMUEL JONES having been elected a Justice of the Supreme Court for the first judicial district, at the election held in May, 1847, resigned his office as a Justice of the Superior Court, and LEWIS H. SANDFORD was appointed to the vacancy, and THOMAS J. OAKLEY was appointed Chief Justice.

The Act of May 12, 1847, provided for the election of three Justices of the Superior Court, at the first judicial election under the Constitution of 1846, and extended the term of office to six years.

At the election held on the 12th of June, 1847,

THOMAS J. OAKLEY,  
AARON VANDERPOEL, and  
LEWIS H. SANDFORD

were elected as Justices, and according to the subsequent allotment of terms of office

Justice VANDERPOEL's term expired December 31, 1849.

“ OAKLEY'S “ “ “ “ 1851.

“ SANDFORD'S “ “ “ “ 1853.

The act of March 24, 1849, provided for the election of three additional Justices of the Court, and on the second Tuesday of April, 1849,

JOHN DUER,  
JOHN L. MASON, and  
WILLIAM W. CAMPBELL,

were elected, and according to the subsequent allotment of the terms of office

Justice MASON'S term expired December 31, 1851.

“ DUER'S “ “ “ “ 1853.

“ CAMPBELL'S “ “ “ “ 1855.

At the same election ELIJAH PAINE was elected for the full term of six years, from the 1st of January, 1850, in the place of Justice VANDERPOEL, whose term of office expired December 31, 1849.

### 1850 TO AND INCLUDING 1859.

On the 1st of January, 1850, the Court consisted of Chief Justice THOMAS J. OAKLEY,

term expiring December 31, 1851.

Justice JOHN L. MASON,	“	“	“	“	“
“ LEWIS H. SANDFORD,	“	“	“	“	1853.
“ JOHN DUER,	“	“	“	“	“
“ ELIJAH PAINE,	“	“	“	“	1855.
“ WILLIAM W. CAMPBELL,			“	“	“

At the general election in November, 1851, Chief Justice THOMAS J. OAKLEY was re-elected for the full term of six years from January, 1, 1852, and JOSEPH S. BOSWORTH was elected for a full term, in place of Justice JOHN L. MASON, whose term of office expired December 31, 1851.

Justice LEWIS H. SANDFORD died July 25, 1852 (see obituary notice in preface of 5th Sandford (7 Superior Court Reports).

ROBERT EMMET was elected in November, 1852, to fill the vacancy and took his seat in November, 1852.

Justice ELIJAH PAINE died October 15, 1853, and MURRAY HOFFMAN was elected in November, 1853, to fill the vacancy, and he took his seat on the third Monday of the November term, 1853.

At the general election in November, 1853, Justice JOHN DUER was re-elected for the full term of six years from January 1, 1854, and JOHN SLOSSON was elected for the same term in the place of Justice ROBERT EMMET, whose term expired December 31, 1853.

At the general election in November, 1855, Justice MURRAY HOFFMAN was re-elected for the full term of six

years from January 1, 1856, and LEWIS B. WOODRUFF was elected for the same term, in place of Justice WILLIAM W. CAMPBELL, whose term expired December 31, 1855.

Chief Justice THOMAS J. OAKLEY died May 11, 1857. See obituary and biographical notice in the preface of 1 Robertson (24 Superior Court Reports).

On May 16, 1857, Justice JOHN DUER was appointed Chief Justice of the Court.

At the general election in November, 1857, Justice JOSEPH S. BOSWORTH was re-elected for the full term of six years from January 1, 1858, and EDWARDS PIERRE-PONT was elected for the same term, in place of Chief Justice THOMAS J. OAKLEY, deceased, whose term would have expired December 31, 1857.

Chief Justice JOHN DUER died August 8, 1858. See obituary notice and proceedings in preface of 6 Duer (13 Superior Court Reports).

At the general election in November, 1858, JAMES MONCRIEF was elected to fill the vacancy for the unexpired term of Chief Justice JOHN DUER, ending December 31, 1859, and he took his seat on December 1, 1858.

On August 31, 1858, Justice JOSEPH S. BOSWORTH was appointed Chief Justice of the Court.

At the general election in November, 1859, Justice JAMES MONCRIEF was re-elected for the full term of six years from January 1, 1860, and ANTHONY L. ROBERTSON was elected for the same term, in place of Justice JOHN SLOSSON, whose term expired December 31, 1859.

### 1860, TO AND INCLUDING 1865.

On the first of January, 1860, the Court consisted of Chief Justice JOSEPH S. BOSWORTH,

term expiring December 31, 1863.

Justice MURRAY HOFFMAN, “ “ “ 1861.

“ LEWIS B. WOODRUFF, “ “ “ “

Justice EDWARDS PIERREPONT,	"	"	"	1863.
" JAMES MONCRIEF,	"	"	"	1865.
" ANTHONY L. ROBERTSON,	"	"	"	"

Justice EDWARDS PIERREPONT resigned November 1, 1860, and at the general election of November, 1860, JAMES W. WHITE was elected to fill the vacancy for the unexpired term of Justice EDWARDS PIERREPONT, ending December 31, 1863.

At the general election in November, 1861, JOHN M. BARBOUR and CLAUDIUS L. MONELL were elected for the full term of six years from January 1, 1862, in the place of Justices MURRAY HOFFMAN and LEWIS B. WOODRUFF, respectively, whose terms expired December 31, 1861.

At the general election in November, 1863, SAMUEL B. GARVIN and JOHN H. McCUNN were elected for the full term of six years from January 1, 1864, in the place of Chief Justice JOSEPH S. BOSWORTH and Justice JAMES W. WHITE, respectively, whose terms expired December 31, 1863.

In January, 1864, Justice ANTHONY L. ROBERTSON was appointed Chief Justice of the Court.

At the general election in November, 1865, Chief Justice ANTHONY L. ROBERTSON was re-elected for the full term of six years from January 1, 1866, and at the same election SAMUEL JONES was elected for the same full term of six years, in place of Justice JAMES MONCRIEF, whose term expired December 31, 1865.

#### 1866 TO AND INCLUDING 1869.

On the first day of January, 1866, the Court consisted of Chief Justice ANTHONY L. ROBERTSON,

				term expiring December 31, 1871.
Justice JOHN M. BARBOUR,	"	"	"	1867.
" CLAUDIUS L. MONELL,	"	"	"	"
" SAMUEL B. GARVIN,	"	"	"	1869.
" JOHN H. McCUNN,	"	"	"	"
" SAMUEL JONES,	"	"	"	1871.

At the general election in November, 1867, Justice JOHN M. BARBOUR and CLAUDIUS L. MONELL were re-elected for the full term of six years from January 1, 1868.

Chief Justice ANTHONY L. ROBERTSON died December 18, 1868, and Justice JOHN M. BARBOUR was appointed Chief Justice of the Court.

FREEMAN J. FITHIAN was appointed by the Governor to fill the vacancy caused by the death of Chief Justice ROBERTSON, until December 31, 1869.

Justice SAMUEL B. GARVIN resigned December 31, 1868, and JOHN J. FREEDMAN was appointed by the Governor to fill his term, expiring December 31, 1869, and at the general election in November, 1869, he was elected for the full term of six years from January 1, 1870.

At the general election in November, 1869, JAMES C. SPENCER was elected for the unexpired term of Chief Justice ANTHONY L. ROBERTSON, and Justice JOHN H. McCUNN was re-elected for the term of six years from January 1, 1870.

At the general election in November, 1869, Article VI of the Constitution of the State of New York (excepting Section 28) was submitted to, and ratified and adopted by the people. This article recognized and continued this Court, and the Court of Common Pleas of New York; the Superior Court of Buffalo, and the City Court of Brooklyn, with all "the powers and jurisdiction they now severally have and such further civil and criminal jurisdiction as may be conferred by law." The justices were named as judges. The official terms of the judges thereafter elected were fixed at fourteen years. Subsequent legislation under this article of the Constitution, conferred additional powers and jurisdiction upon this Court that made it a civil court of general jurisdiction (See Constitution and Statutes).

## 1870 to 1874.

On the first day of January, 1870, the Court consisted of  
Chief Judge JOHN M. BARBOUR,

term expiring December 31, 1873.

Judge CLAUDIUS L. MONELL,	"	"	"	"
" JOHN H. McCUNN,	"	"	"	1874.
" SAMUEL JONES,	"	"	"	1871.
" JOHN J. FREEDMAN,	"	"	"	1875.
" JAMES C. SPENCER,	"	"	"	1871.

At the general election in November, 1871, WILLIAM E. CURTIS and JOHN SEDGWICK were elected to succeed Judges SAMUEL JONES and JAMES C. SPENCER, whose respective terms had expired.

Judge JOHN H. McCUNN died July 6, 1872.

At the general election in November, 1872, HOOPER C. VAN VORST was elected for the full term of fourteen years from January 1, 1873, to succeed Judge JOHN H. McCUNN, deceased.

At the general election in November, 1873, Judge CLAUDIUS L. MONELL and GILBERT M. SPEIR were elected to fill the places which would become vacant on the first day of January, 1874, by the expiration on that day of the terms for which Chief Judge JOHN M. BARBOUR and Judge CLAUDIUS L. MONELL had been elected.

On the 31st day of December, 1873, Chief Judge JOHN M. BARBOUR retired from the Bench. An account of the proceedings had in the Court on his retirement will be found in Volume 36 of these reports.

Shortly after January 1, 1874, Judge CLAUDIUS L. MONELL was elected Chief Judge of the Court.

## 1874 to 1876.

On the first day of January, 1874, the Court consisted of

Chief Judge CLAUDIUS L. MONELL,

Judge JOHN J. FREEDMAN,

" WILLIAM E. CURTIS,

Judge JOHN SEDGWICK,  
“ HOOPER C. VAN VORST,  
“ GILBERT M. SPEIR.

At the general election in November, 1875, CHARLES F. SANFORD was elected for the full term of fourteen years from January 1, 1876, to succeed Judge JOHN J. FREEDMAN, whose term had expired.

Chief Judge CLAUDIUS L. MONELL died August 1, 1876. (See Memorial at page 547 of Volume 41 of these reports.)

At the general election in November, 1876, JOHN J. FREEDMAN was elected for the full term of fourteen years from January 1, 1877, to succeed Chief Judge CLAUDIUS L. MONELL, deceased.

On October 4, 1876, Judge WILLIAM E. CURTIS was elected Chief Judge of the Court.

On December 8, 1876, Judge JOHN J. FREEDMAN was appointed by the Governor for the interval to December 31, 1876.

### 1877 to 1883.

On the first day of January, 1877, the Court consisted of  
Chief Judge WILLIAM E. CURTIS,

Judge JOHN SEDGWICK,  
“ HOOPER C. VANVORST,  
“ GILBERT M. SPEIR,  
“ CHARLES F. SANFORD,  
“ JOHN J. FREEDMAN.

Chief Judge WILLIAM E. CURTIS died July 6, 1880, (see Memorial at page 583 of Volume 46 of these reports). and HORACE RUSSELL was appointed by the Governor to succeed him and to serve until December 31, 1880.

Judge JOHN SEDGWICK was elected Chief Judge of the Court.

At the general election in November, 1880, CHARLES H. TRUAX was elected for the full term of fourteen years

from January 1, 1881, to succeed Chief Judge WILLIAM E. CURTIS, deceased.

Judge CHARLES F. SANFORD died October 21, 1881 (see Memorial at page 563 of Volume 47 of these reports), and HORACE RUSSELL was appointed by the Governor to succeed him, and to serve until December 31, 1882.

Judge GILBERT M. SPEIR resigned to take effect December 31, 1881, and WILLIAM H. ARNOUX was appointed by the Governor to succeed him and to serve until December 31, 1882.

At the general election in November, 1882, RICHARD O'GORMAN and GEORGE L. INGRAHAM were elected for the full term of fourteen years from January 1, 1883, to succeed Judges HORACE RUSSELL and WILLIAM H. ARNOUX, whose respective terms expired December 31, 1882.

### 1883 to 1893.

On the first day of January, 1883, the Court consisted of  
Chief Judge JOHN SEDGWICK,

Judge HOOPER C. VAN VORST,

“ JOHN J. FREEDMAN,

“ CHARLES H. TRUAX,

“ RICHARD O'GORMAN,

“ GEORGE L. INGRAHAM.

At the general election in November, 1885, Chief Judge JOHN SEDGWICK was elected for the second full term of fourteen years from January 1, 1886, to succeed himself.

At the general election in November, 1886, PHILIP H. DUGRO was elected for the full term of fourteen years from January 1, 1887, to succeed Judge HOOPER C. VAN VORST, whose term expired December 31, 1886.

At the general election in November, 1889, DAVID MC-ADAM was elected for the full term of fourteen years

from January 1, 1890, to succeed Judge RICHARD O'GORMAN, whose term expired by reason of age limit (70 years).

At the general election in November, 1890, Judge JOHN J. FREEDMAN was elected for a second full term of fourteen years from January 1, 1891, to succeed himself.

HENRY A. GILDERSLEEVE was appointed by the Governor to serve until December 31, 1891, to succeed Judge GEORGE L. INGRAHAM who had been appointed a Justice of the Supreme Court, and who resigned as a Judge of the Superior Court on May 2, 1891.

At the general election in November, 1891, Judge HENRY A. GILDERSLEEVE was elected for the full term of fourteen years from January 1, 1892, to succeed himself.

On the first day of January, 1893, the Court consisted of Chief Judge JOHN SEDGWICK,

term expiring December 31, 1899.

Judge JOHN J. FREEDMAN,	"	"	"	1904.
" CHARLES H. TRUAX,	"	"	"	1894.
" PHILIP H. DUGRO,	"	"	"	1900.
" DAVID MCADAM,	"	"	"	1903.
" HENRY A. GILDERSLEEVE,	"	"	"	1905.

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### CLERKS OF THE COURT.

RICHARD HATFIELD, from May 6 to May 12, 1828.

C. A. CLINTON, from May, 1828, to January, 1844.

JESSE OAKLEY, from January, 1844, to September, 1848.

DAVID R. FLOYD JONES, from Sept., 1848, to March, 1852.

R. G. CAMPBELL, from March, 1852, to March, 1853.

GEORGE H. E. LYNCH, from April, 1853, to July, 1855.

GEORGE T. MAXWELL, from July, 1855, to Sept. 1860.

R. D. LIVINGSTON, from September, 1860, to June, 1866.

GEORGE E. BALDWIN, from June, 1866, to Sept., 1866.

JAMES M. SWEENEY, from Sept. 1866, to December, 1871.

THOMAS BOESE, from January, 1872, to January, 1893.

## REPORTERS OF THE COURT.

JONATHAN PRESCOTT HALL reported the opinions of the Court from and including August, 1828, to and including December, 1829, 2 volumes.

Justice LEWIS H. SANDFORD from and including October, 1847, to and including May, 1852. 5 volumes.

Chief Justice JOHN DUER from May, 1852, to and including March, 1857. 6 volumes.

Chief Justice JOSEPH S. BOSWORTH from April, 1857, to and including December, 1862. 10 volumes.

Chief Justice ANTHONY L. ROBERTSON from April, 1868, to and including December, 1868. 7 volumes.

JAMES M. SWEENEY from January, 1869, to and including December, 1870. 2 volumes.

SAMUEL JONES and JAMES C. SPENCER, from January, 1871, to and including December, 1891. On the death of Hon. SAMUEL JONES, in August, 1892 (see memorial in this volume), the reports were continued under the same name by JAMES C. SPENCER to December 31, 1892, comprising 29 volumes, including this, when by an act of the Legislature (Chap. 598, Laws of 1892) the decisions of this Court, with those of other courts, namely: The Court of Common Pleas of the City of New York; The Superior Court of Buffalo; The City Court of Brooklyn; The City Court of the City of New York, and of the Surrogates' Courts, etc., were placed in charge of a Reporter (known as the "Miscellaneous Reporter") appointed by the Governor, for reporting, under the name of "Miscellaneous Reports."



## IN MEMORIAM.

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At a General Term of the Superior Court of the City of New York, held at the City of New York, in the Court House, in the City of New York, on the 12th day of December, 1892.

Present,

FREEDMAN, P. J., MCADAM and GILDERSLEEVE, JJ.

The Court directed the following entry to be made in the minutes of this term :

SAMUEL JONES, late a Judge of the Superior Court, and for many years last past one of its reporters, died at Poughkeepsie, N. Y., August 11, 1892.

He was elected a Judge of this Court in the year 1865, and took his seat in January, 1866, and served until the end of his term, December 31, 1871.

After his retirement from the Bench, he accepted from the Court an appointment as Reporter, and with his associate, Ex-Judge JAMES C. SPENCER, edited twenty-seven (27) volumes of the Reports of the Superior Court, in all of which he did an equal amount of the Reporters' work. Two volumes yet remain to be published as N. Y. Superior Court Reports, which will contain the decisions rendered by the Court before his death.

Judge JONES was the son of SAMUEL JONES, formerly Chancellor of the Court of Chancery, State of New York, and Chief Justice of this Court from its organization in

1828, until 1847, when he resigned to enter the Supreme Court, to which he had been elected as a Justice of the first Judicial District of the State, under the Constitution of 1846. He was born in February of the year 1825, and entered Columbia College in 1841, and graduated therefrom in 1845, and immediately thereafter entered into the law office of the late Daniel Lord, from whence he was admitted to the Bar in 1847, and entered into the active practice of the law in New York City.

His ability and reputation as a lawyer and as a citizen led to his nomination and election as a judge of this Court, and the able, fearless and conscientious discharge of his duties as such for the term of six years won for him the deserved respect and esteem of his brethren of the Bench and Bar of the City and State of New York, and of all good citizens to whom he was known.

The Court suggests that in the concluding volume of the series of the separate reports of this Court, now being edited by the associate of Judge JONES under the same name as heretofore (Jones and Spencer), these minutes of this Court shall find a place, with such additional biographical minutes of Judge JONES as may be deemed appropriate to the memory of the good and able judge and lawyer, and the worthy citizen.

The only additions made to this record of the Superior Court are as follows :

In January, 1893, the Association of the Bar of the City of New York through its Executive Committee prepared a memorial of Judge JONES for adoption by the Association, and for insertion in its "Memorial Book and Mortuary Roll" which is published in the annual report of the Association. The Executive Committee requested Ex-Judge JAMES C. SPENCER, the associate and friend of Judge JONES, to attend a meeting of the Association, held on the first Tuesday of March, 1893, and read the Memorial.

It was read and approved at that meeting, and direction given to send a copy to the Judges of the Superior Court for filing and record in Court.

This Memorial being substantially the same as that previously adopted by the Superior Court, only the following and latter portions are quoted.

“ Judge JONES, the subject of this sketch, was born in February of the year 1825. He entered Columbia College in 1841, and graduated therefrom in 1845, and immediately thereafter commenced the study of law in the law office of the late Daniel Lord. He was admitted to the Bar in 1847, and entered into the active practice of his profession in New York City.

“ In October, 1854, he was married to Martha Barnard of Poughkeepsie, thereby perfecting a social union that continued in perfect conditions of love and companionship until his death.

“ His ability and reputation as a lawyer and as a citizen led to his nomination and election as a Judge of the Superior Court of the City of New York, and the able, fearless and conscientious discharge of his duties as such for the term of six years, won for him the deserved respect and esteem of his brethren of the Bench and Bar of the City and State of New York, and of all good citizens to whom he was known.

“ He was a worthy citizen and gentleman in every sphere of his active life, and his many gentle and endearing traits of character will be remembered in social and professional circles, and remain a pleasing memory among his associates and brethren of the Bench and Bar, and his friends and fellows, in public and private station.”



CASES  
ARGUED AND DETERMINED  
IN  
THE SUPERIOR COURT  
OF THE  
CITY NEW YORK.

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UNITED STATES TRUST COMPANY OF NEW  
YORK, AS TRUSTEE, ETC., RESPONDENT v. MILES  
M. O'BRIEN, APPELLANT.

*Landlord and tenant—Lease, breach of covenant thereof—Damages.*

This action was brought to recover damages for an alleged breach of the usual clause or covenant in a lease which required the defendant (the lessee) to permit the notice "To Let" to be placed upon the building, and to allow the building to be inspected by persons desiring to rent the same from the plaintiff (the lessor). A sub-tenant of the defendant occupying the premises from March 1 to May 1, 1889, the last portion of the term, refused to permit the plaintiff to exhibit the premises or to put up the bill of "To Let" thereon, as provided for in the covenant.

There was no evidence that the plaintiff could have rented the premises, beyond that to be inferred from the fact that defendant's sub-tenant refused to show the premises to a person taken there to inspect them and to permit the bill "To Let" to remain on the premises. After the termination of the lease the premises remained vacant for about five months. They were worth about \$75 per month, and the jury awarded the plaintiff \$375 damages, being the rent for the time the premises were vacant.

Statement of the Case.

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*Held*, that there was no reasonable certainty that the plaintiff would have let the house if the covenant claimed to have been violated had been literally and fully performed. There was no solid substantial basis on which the jury could find, as matter of fact, that the refusal to perform this covenant was the sole cause of keeping plaintiff's house idle for five months, and in consequence plaintiff lost so many months' rent. The result arrived at was necessarily speculative and conjectural. The jury were limited to an award for damages or compensation for the *actual*, not the *possible* loss, and from the evidence there is no way of determining that the sum awarded was necessary to compensate for the real injury done, or that the acts of the under-tenant were the proximate cause of so much damage. There was nothing in the proofs presented on the trial of this action to warrant the damages allowed to the plaintiff and awarded by the verdict of the jury.

Before SEDGWICK, Ch. J., FREEDMAN and McADAM, JJ.

*Decided May 2, 1892.*

## STATEMENT OF THE CASE BY THE COURT.

The action is by the plaintiff, as the successor in interest of the landlord of No. 240 East 60th street, against the defendant as tenant, to recover damages, for a breach of the following covenant, contained in the lease of the premises "that the defendant will at any reasonable hour in the daytime, permit the lessor or his agent to show the premises to such persons as he desires for the purpose of selling or leasing the same, and will permit the usual notice of 'To Let' to be posted on the premises there to remain without molestation." The demise was for three years commencing May 1, 1886, and ending May 1, 1889. In November, 1888, the defendant vacated the premises, and in the following February, he sub-let them from March 1 till May 1, 1889, to a Mrs. Worms, who refused to permit the plaintiff to exhibit the premises or put up the bill of "To Let" provided for by the covenant. Mrs. Worms moved away on May 1, 1889, and the premises remained vacant for about five months. They were worth about

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Appellant's points.

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\$75 per month, and the jury awarded the plaintiff \$375 damages, being the rent for the time the premises were vacant. There was no evidence that the plaintiff could have rented the premises, except that to be inferred from the fact, that the defendant's lessee, Mrs. Worms, refused to show the premises to a person taken there to inspect them and saying she would not permit any person to examine them, and by her refusal to permit the bill of "To Let" to remain on the premises.

The defendant moved for a new trial, which was denied, and from the judgment and order denying said motion the defendant appeals.

*Durnin & Hendricks.* attorneys and of counsel, for appellant, argued:—

I. It cannot be said that the proximate cause of the house remaining idle from the first of May, 1889, until the first of February, 1890, was the act of the defendant in refusing to allow the notice "To Let" to be placed upon the house or persons to inspect the same, or that the fact that the house remained empty was the natural result of such acts, and, therefore, no damage was shown and the motion to dismiss the complaint, either at the close of the plaintiff's case or at the close of the whole case, should have been granted. *Sedgwick on Damages*, 8th edition, vol. 1, p. 56; *Greenleaf on Evidence*, 14th edition, vol. 2, § 256; *Griffin v. Colver*, 16 *N. Y.*, 489; *Baldwin v. U. S. Tel. Co.*, 45 *Ib.*, 744; *Parsons v. Saltus*, 66 *Ib.*, 92; *Frye v. Maine Central*, 67 *Maine*, 414; *U. S. Tel. Co. v. Gildersleeve*, 96 *Am. Dec.*, 519; *Ashe v. De Rosset*, 72 *Ib.*, 552; *Wulstein v. Mohlman*, 57 *Supr.*, 50–57; *Allen v. McConike*, 124 *N. Y.*, 342. In *Griffin v. Colver*, 16 *N. Y.*, 489, one of the leading cases in this state, at page 49, the rule is laid down as follows: "The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must

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Appellant's points.

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be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed. The familiar rules on the subject are all subordinate to these. For instance: That the damage must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last. These two conditions are entirely separate and independent, and to blend them tends to confusion, thus the damages claimed may be the ordinary and natural, and even necessary result of the breach; and yet if in their nature uncertain they must be rejected, as in the case of *Blanchard v. Ely*, where the loss of the trips was the direct and necessary consequence of the plaintiff's failure to perform. So they may be definite and certain, and clearly consequent upon the breach of contract, and yet if such as would not naturally flow from such breach, but for some special circumstances collateral to the contract itself or foreign to its apparent object they cannot be recovered; as in the case of the loss by the clergyman of his tithes by reason of the failure to deliver the house." In *Allen v. McConike*, 124 *N. Y. R.*, 342, at page 347, the court says: "The general rule for determining the amount of damages recoverable for the violation of a contract or the breach of a duty is that the injured party is entitled to such as are the natural (or to be apprehended) direct and immediate results of the breach (*Griffin v. Colver*, 16 *N. Y.*, 489; *Hamilton v. McPherson*, 28 *Ib.*, 72; *Hadley v. Baxendale*, 9 *Exch.*, 341). This rule is subject to the qualification that if the person injured thereafter negligently suffers his loss to be enhanced the increase so occasioned cannot be recovered from the person who first violated his contract or duty, and in some cases it is incumbent on the person

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Respondent's points.

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damnified to take such active measures as he reasonably may to minimize the damages naturally flowing from the breach. *Hamilton v. McPherson*, 28 *N. Y.*, 72; *Johnson v. Meeker*, 96 *Ib.*, 93-97; 1 *Suth. Dam.*, 148; 1 *Sedg. Dam.*, 7 ed., 56; *May Dam.*, 86.

II. "Damages for breaches of contract are only those which are incidental to, and directly caused by the breach, and may reasonably be presumed to have entered into the contemplation of the parties," that a lessee should be liable for a breach of a covenant like the one in the case at bar. During the period after the lessor has taken possession and until the premises are again rented cannot reasonably be presumed to have entered into the contemplation of the parties. *Hamilton v. McPherson*, 28 *N. Y.*, 72; Cases cited, *supra*. (1.) There is no evidence that any one was willing to take the premises from May 1, 1889, the property certainly could not have been occupied by any tenant while the mechanics were there repairing. It took about three weeks to make the repairs, and the exception to the judge's charge that the measure of damages was the reasonable rental value from May 1, 1889, until the premises were rented is well taken. (2.) The exceptions to the refusal to charge are also well taken. The plaintiff did not attempt to post the notice "To Let" after February 1, 1889, but acquiesced in the occupant's refusal to allow them to do so.

*Stewart & Sheldon*, attorneys, and *Samuel H. Benton* of counsel, for respondent, argued:—

I. The court did not err in refusing the motions to dismiss, made on the ground that there was no proof that the failure to rent was the result of defendant's acts. We assume that the motion was directed to the point that the evidence did not show a connection between the injury and the damage. The motion to dismiss was renewed at the close of the testimony "on the ground

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Respondent's points.

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that there is no evidence in the case upon which a verdict of the jury can be based against the defendant. That there is no proof of damages and on the ground that if the case be submitted to the jury it will be speculative as to the amount of damages." The question here is, is this a case of *injuria sine damno* (*Sedgwick on Damages*, § 32), or of *injuria* resulting in damage? That is, does the damage proved by the plaintiff result from the wrong of the defendant. The wrong is admitted. The only denial is that it caused the damage. The defendant cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. *Davis v. Garratt*, 6 *Bingham's Reports*. This was the famous case where a cargo of lime was damaged by a tempest, the defendant having deviated from the course agreed upon. The defence was that no damages were proved, because the cargo might not have been brought safely to port in good condition had the deviation not taken place. The defence was held bad. TINDAL, Ch. J., said: "No wrongdoer can be allowed to apportion or qualify his own wrong; as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer the bare possibility of a loss if his wrongful act had never been done." This principle was adopted in *Drucker v. Manhattan Ry. Co.*, 106 *N. Y.*, 157. The court say, at page 164: "But when all the proof which, in the nature of the case is fairly possible has been given, the good sense of a jury must provide the answer, and it is no defence that such judgment involves more or less of estimate and opinion having very little to guide it. That criticism has no force in the mouth of the wrongdoer when all reasonable data have been furnished for consideration." It has never been held in this state that in an action for breach of contract it must be shown with absolute certainty that the damage resulted from the breach, and

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Respondent's points.

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could have proceeded from no other acts. *Hexter v. Knox*, 63 *N. Y.*, 561; *Mayers v. Burns*, 35 *Ib.*, 269; *Van Wyck v. Allen*, 69 *Ib.*, 61; *Parks v. Morris Ax Co.*, 54 *Ib.*, 586. In *Van Wyck v. Allen* cabbage seed sold were warranted to be of a particular kind. When sowed they produced an inferior crop. Held that the damage was the difference in the value of the crop raised and that which would have been raised if the seed had been according to warranty. The objection was made in this case that it by no means followed that if the defendant had obtained the original seed he would have raised any crop at all; but the court took the view that as the vendor had broken his contract he could make no such defence, and it was not incumbent upon the plaintiff to prove absolutely, what was clearly impossible, that he could have raised and sold a crop from the seed contracted for. In *Parks v. Morris Ax Co.*, 54 *N. Y.*, 586, bad steel was sold to the plaintiff, who manufactured it into axes. Held, that his damage was the difference between the value of the manufactured product and what its value would have been had he received good material from the defendant. The rule as to what damages can be recovered for breach of contract is well laid down in *Allen v. McConike*, 124 *N. Y.*, 342. The court say at page 347, "The general rule for determining the amount of damages recoverable for the violation of a contract or the breach of a duty, is that the injured party is entitled to such as are the natural (or to be apprehended), direct and immediate results of the breach." Citing, *Griffin v. Colver*, 16 *N. Y.*, 489, and other cases. It is certainly the direct and natural result of refusal to allow the premises to be seen that no one would rent them. The contract was made to give an opportunity for renting the premises in the ordinary way, and the parties clearly had in mind this object. They drew the contract so that the right to show the premises might exist, and a remedy be afforded

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Opinion of the Court, by McADAM, J.

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for a failure to comply therewith. It would probably surprise a plain man to be told that where a tenant had made a contract to allow the premises to be billed "To Let" and shown to applicants, and then refused to permit these things, and the property remained unrented thereafter, although the landlord diligently attempted to rent the same, that the vacancy was not produced by the refusal to allow the premises to be shown. The burden of proof was on the defendant to show, that the failure to let did not proceed from his acts, the plaintiff having proved diligent effort to rent the premises.

II. The verdict was clearly in accordance with the evidence. It does substantial justice, and the judgment should be affirmed. The case was tried with great liberality towards the defendant by the court. The complaint alleged breach of contract by failure to allow the premises to be billed and shown to persons desiring to rent. The only defence was a denial, no special defence being set up. Notwithstanding this fact, the court allowed the defendant to give evidence of attempts to rent the premises and to furnish a tenant to the plaintiff long prior to the breach alleged.

BY THE COURT.—McADAM, J.—Liability for breach of covenant is less extensive than that for a tort, and involves only such consequences as are the direct and proximate result of the act complained of. There are certain arbitrary rules in regard to such breaches, the principal of which is to give compensation for what is actually lost, to make the damages correspond with the real injury sustained, but not to permit a recovery where the loss cannot be directly traced to the act done or omitted. It will be sufficient if the injury is a natural or necessary consequence of the act, but remote or merely possible consequences are excluded from consideration. There are many cases of loss for which the law affords no adequate remedy, hence has arisen the system of pre-

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Opinion of the Court, by MCADAM, J.

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ventive justice administered in the courts of equity, by means of injunction to restrain breaches of covenant. Covenants not to sub-let or assign have not generally raised any question of damage, but one of forfeiture (3 *Sutherland on Dam.*, 143), owing to the difficulty in establishing any legal measure of compensation for the breach. The question involved here is much like that suggested. There is no reasonable certainty that the plaintiff would have let the house if the covenant said to have been violated had been literally performed. Sometimes the condition of the inside of a house is more uninviting than the outside, and an inside examination (if one had been afforded) might have repulsed the applicant for the house at once. There was therefore no solid substantial basis on which the jury could find as matter of fact that the refusal to perform the covenant was the sole cause of keeping the plaintiff's house idle for five months, and that the plaintiff as a consequence lost so many months' rent. The result arrived at was necessarily speculative and conjectural. If the action had been founded on tort, instead of upon contract, a more liberal field for the exercise of discretion would have been afforded to the jury, but they were limited in this case to the awarding of compensation for the actual, not the possible loss, and there is no way of determining from any of the evidence adduced that the sum awarded was necessary to compensate the real injury done or that the acts of the undertenant were the proximate cause of so much damage. It is owing to the impossibility to arrive at a legal measure of damages with any sufficient degree of certainty that courts of equity entertain jurisdiction in such cases (*Pom. Eq.*, § 1403), and by writ of injunction in the nature of specific performance enforce the terms of the covenant. This could have been done here by enjoining the defendant and his tenant from preventing the plaintiff putting up the bill of "To Let" or from interfering with it after it was put up, or

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Opinion of the Court, by MCADAM J.

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from exercising its right of showing the premises during some reasonable hour of the day to be determined by the court, and best calculated to serve the object of the covenant and the convenience of all concerned. The court gives specific performance instead of damages when it can by that means do more perfect and complete justice, and the covenant sought to be compensated by damages, could have been more effectually enforced at the time with perfect and complete justice in equity, than it can now by the uncertain character of proof available in an action at law for compensatory damages.

A man who enters into an agreement is bound in equity to a true and literal performance of it. He cannot be suffered to depart from it at pleasure, leaving the other party to his remedy for damages by law. *Kerr on Inj.*, 534. It is no answer to say that the act complained of will inflict no injury on the plaintiff, or will be even beneficial to him. It is for the plaintiff to judge whether the agreement shall be preserved as far as he is concerned, or whether he will permit it to be violated. *Ib.*, p. 533. There is no wrong without a remedy, which means its appropriate remedy, and where that is to be found in equity it should be sought for there, or the plaintiff may be referred to *Injuria absque damno* or some other maxim which may defeat his recovery at law. There was nothing in the proofs presented to warrant the damages allowed to the plaintiff, and for this reason, the judgment and order appealed from must be reversed and a new trial awarded, with costs to the appellant to abide the event.

SEDGWICK, Ch. J., and FREEDMAN, J. concurred.

Respondent's points.

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THE SWAN LAMP MANUFACTURING COMPANY, RESPONDENT v. THE BRUSH-SWAN ELECTRIC LIGHT COMPANY OF NEW ENGLAND, APPELLANT.

*Complaint for goods sold and delivered sufficient to cover a special contract of sale of merchandise at a discount of 20 per cent. from trade prices, on ninety-day drafts.*

*Held, that the transaction between the plaintiff and defendant was practically a sale of goods by the former to the latter on its credit at twenty per cent. less than trade prices, deliverable in such manner as defendant directed.*

The defendant insists that, under the circumstances, the plaintiff should have declared on this special agreement and cannot recover on a general count for goods sold and delivered. The Code has not changed the former rule of pleading, that a party, who has fully performed a special contract may rely upon the implied assumpsit of the other party to pay him the stipulated price, and he is not bound to declare specially upon the special agreement. Under this rule the complaint was sufficient.

Before SEDGWICK, Ch. J., FREEDMAN and Mc-  
ADAM, JJ.

*Decided May 2, 1892.*

Appeal from a judgment entered in favor of the plaintiff on the report of a referee, to whom it was referred to determine the issues.

*Cravath & Houston, attorneys, and John W. Houston of counsel, for appellant.*

*G. H. & F. L. Crawford, attorneys, and G. H. Crawford of counsel, for respondent.*

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Opinion of the Court, by MCADAM, J.

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BY THE COURT.—MCADAM, J.—It is alleged by the defendant and admitted by the plaintiff that the goods furnished by the plaintiff were delivered under and pursuant to a contract between the defendant and the Swan Incandescent Electric Light Co., which was transferred by that company to the plaintiff, so that the plaintiff for all practical purposes was substituted as a party to the contract in place of that corporation. The defendant by the contract became the sole agent for the sale of electric lamps and other electrical apparatus manufactured by the plaintiff, which agency covered certain territory specified in the agreement. The plaintiff was to deliver such goods as might be sold by the defendant and ordered by it on board of such cars or other conveyances as it might designate, and the defendant was to be allowed on such sales a discount of twenty per cent. from the trade price fixed by the plaintiff. The goods so delivered were to be paid for by the defendant, by ninety-day drafts, or at its option, in cash with one and a half per cent. additional discount. The plaintiff filled orders furnished by the defendant, until it became indebted in the amount found due by the referee. The transaction between the plaintiff and defendant was practically a sale of goods by the former to the latter, on its credit, at twenty per cent. less than trade prices, deliverable in such manner as it directed. It certainly was not a sale of goods by the plaintiff to the defendant's customers, for the plaintiff by the contract was to make no sales in the territory assigned to the defendant, except through it and on its responsibility. The defendant insists that the plaintiff should have declared on the special agreement, and could not recover as for goods sold and delivered. The answer to that objection is, that the Code has not changed the former rule of pleading, that a party who has fully performed a special contract on his part may count upon the implied assumpsit of the other party to pay him the stipu-

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Statement of the Case.

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lated price, and is not bound to declare specially on the agreement, *Farron v. Sherwood*, 17 *N. Y.*, 227 ; *Hosley v. Black*, 28 *Ib.*, 443 ; *Higgins v. Newtown & F. R. R. Co.*, 66 *Ib.*, 604. The evidence adduced satisfactorily sustains the findings and conclusions of the referee, and we find no error in the rulings that require a new trial. The objection that as to a portion of the goods, the credit of ninety days had not expired when the action was commenced, is unavailing because not raised by the answer, *Smith v. Holmes*, 19 *N. Y.*, 271. This upon the ground that new matter must be pleaded, *Code* § 500, subd. 2. It follows that the judgment appealed from must be affirmed, with costs.

SEDGWICK, Ch. J., and FREEDMAN, J., concurred.

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WILLIAM B. DUNCAN, JR., RESPONDENT v. THE  
NEW YORK MUTUAL INSURANCE COM-  
PANY, APPELLANT.

*Marine insurance—Cancellation of policy by agreement of parties does not affect a loss of a ship prior to the cancellation that was unknown to both parties.*

The principal question in this case related to the effect of a cancellation of the policy after the loss of the vessel and before either party had knowledge of the loss. The parties intended to and did cancel the policy, not from the time of its original execution and delivery, but on and after December 3, 1888, the day of its cancellation. The defendant retained the premium for the risk to that time, merely returning the unearned premiums for the unexpired time of the policy. *Held*, that the vessel having been lost prior to the cancellation, the liability of the defendant had become fixed and irrevocable at the time of the loss. The plaintiff did not intend to release, nor did the defendant expect to be released from any liability

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Appellant's points.

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already incurred and existing, but only from any liability that might occur thereafter.

This action was in equity to set aside the cancellation and recover the loss.

*Held*, that plaintiff required no equitable relief, assuming that the cancellation operated as to future liability only, but the plaintiff assumed that equitable relief was necessary to reinstate the parties to their position prior to the cancellation, but the defendant not having raised the objection in his answer that equitable relief was unnecessary, cannot raise it now, and, therefore, it may be assumed that the plaintiff was properly in equity in his action, and that branch of the court obtained complete jurisdiction in the controversy.

Before SEDGWICK, Ch. J., FREEDMAN and McADAM, JJ.

*Decided May 2, 1892.*

The plaintiff recovered a judgment after a trial at the equity term of the court, setting aside the cancellation of a policy of marine insurance, and awarding him \$6,009.96 damages on the policy.

The defendant appeals.

*North, Ward & Wagstaff*, attorneys, and *J. Langdon Ward* of counsel, for appellant, argued :—

No case is made, either by the evidence or the findings of fact in the court below, to justify the second conclusion of law of the court and the setting aside of the cancellation of the policy. (a.) The court below has found as matter of fact that the plaintiff applied to the defendant to cancel the policy in suit from and after noon of the 3d day of December, and to return the *pro rata* premium for the unexpired term of eight months, which the defendant agreed to do. That when the plaintiff applied to the defendant to cancel the policy he requested that it be canceled upon the terms stated in a paper then submitted by him to the defendant, as follows :

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Appellant's points.

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“NEW YORK, December 3d, 1888.

“ Clause added to Policy No. 31,466 of New York Mut. Ins. Co. issued to W. B. Duncan, Jr., Str. ‘ Samana.’ At the request of the assured this policy is hereby canceled at and from December 3d, 1888, at noon, *pro rata* premium to be paid for eight months not used, \$233.33.

“ Approved.

“ President,”

and that the defendant then and there agreed with the plaintiff that he would cancel the said policy upon the terms mentioned in the said exhibit. But the court also found that, instead of such cancellation, the defendant's president wrote across the face of the policy the following words: “Canceled at request of insured R. P. for eight months, December 3, 1888, T. B. B., Jr., Pt.” and endorsed upon the policy. “Pay \$233.33 return premium and cancel policy December 3, '88. \$233.33. T. B. B., Jr., P.” and did not sign the paper so presented as above noted. That before the payment of the return premium the agent of the plaintiff requested the defendant's president to change the endorsement of the policy so as to conform to such written and printed paper, but that the defendant's president refused so to do, and that thereafter the return premium due on the cancellation of the policy was paid to and accepted by the plaintiff. The court has further found that on the day of the cancellation of the policy neither the plaintiff nor the defendant had received any information whatever concerning the steamer insured since she had sailed; and the plaintiff himself testified that there was at that time no possibility of hearing as to her arrival or non-arrival at Aux Cayes. It thus appears that before the payment and receipt of the return premium the form of the actual

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Appellant's points.

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cancellation of the policy was known to the plaintiff, and that unless satisfied with it he was under no obligation to accept it. There is nowhere any finding, testimony or suggestion that there was anything included in it or omitted from it without the knowledge of the plaintiff's agents. The court has also found that the cancellation of the policy was not induced by any act, deception or suppression of the defendant, and that it was a part of the contract of insurance that it would be terminated and a *pro rata* portion of the premium returned at the will of the assured. The return of the premium and cancellation of the policy was, therefore, a performance of the contract. These facts bring this case precisely within *Whittemore v. Farrington*, 76 N. Y., 457. This was a case where on an exchange of lands the plaintiff had the right under his contract to demand from the defendant a warranty deed. He did demand it, but the defendant refused it. The plaintiff thereupon accepted a quit-claim deed. It subsequently appeared that the property conveyed was, at the time of the conveyance, unknown to either party, subject to an incumbrance. The plaintiff sued to rescind the agreement for the exchange of lands, and a reconveyance of the land deeded thereunder, or that defendant be required to remove encumbrance on the land deeded by him under the agreement. RAPALLO, J., said: "The question is then reduced to this: A party who under a verbal agreement for the conveyance to him of lands, is entitled to insist upon a good title, and a deed with covenants, pays the consideration and is then tendered a deed without covenants. He demands a deed with covenants and this is refused. He then accepts the deed without covenants and, believing the title to be clear, records it, and continues to occupy and improve the property. An incumbrance, unknown at the time to both parties, is afterwards discovered. Both parties are innocent of any fraud. It is conceded that no legal liability

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Appellant's points.

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rests upon the grantor in such a case. *Bates v. Delavan*, 5 *Paige*, 300, 307 ; *Burwell v. Jackson*, 9 *N. Y.*, 535. In the absence of fraud or covenants a purchaser takes the title at his own risk. Then do the facts stated entitle the plaintiff to any equitable relief? We think not. The theory of the judgment is that the acceptance of the quit-claim deed in performance of the contract of exchange may be set aside on the ground of mistake, and the contract, treated as still executory and a new performance in a different manner, be decreed. The theory is ingenious, but is not founded upon any legal precedent or principle. In the first place, there was no mistake as to the character of the deed which was tendered and accepted. The grantee knew by accepting it he took the risk of any defect in the title which might be discovered. He was not led into accepting it by any deception or suppression on the part of the grantor. Secondly, the delivery and acceptance of the deed constituted a full execution of the prior parol contract. The title to the land passed under the deed, and the original contract was merged in it. After a contract has been thus fully performed there can be no jurisdiction in equity to decree a second performance. In a proper case equity has jurisdiction, on the ground of mistake, to reform the instrument or deed by which a prior contract has been executed or performed, but to authorize the exercise of this jurisdiction there must have been a mutual mistake as to the contents of the instrument sought to be reformed, or else mistake on one part and fraud upon the other. Where both parties are innocent of fraud and both know the character and contents of the instrument, it cannot be reformed in equity merely on the ground that one of the parties would have exacted and would have been entitled to exact a different instrument had he been acquainted with facts rendering it to his interest to do so, or which, if he had known them, would have caused him to reject

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Appellant's points.

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the instrument which he accepted. It is beyond the power even of a court of equity to make contracts for parties. The jurisdiction to reform written instruments free from fraud is exercised only where the instrument actually executed differs from what both parties intended to execute, and supposed they were executing or accepting, and this mistake will be corrected in equity only on the clearest proof, and that only by making the instrument conform to what *both* parties intended. But an instrument or covenant, the nature and contents of which are fully comprehended by both parties at the time of its execution, cannot be altered in its terms by the courts, see *Wilson v. Deen*, 74 *N. Y.*, 531, and authorities there cited." (b.) The court has found, and the fact is, that the defendant had no choice under the terms of the policy but to cancel it when requested. An application to cancel was on the part of the assured a warranty that the vessel had arrived in safety, and that there was no claim under the policy. *May v. Christie*, *Holt*, 67. (c.) The cancellation of the policy was not the result of such a mistake of fact as will justify a court of equity in interfering. Properly speaking, there was no mistake of fact in the matter. There can be no mistake, properly so called, as to a fact concerning which the party making the alleged mistake neither has, nor by possibility can have, any knowledge, information or reasonable grounds for belief. The fact is that there is nothing in the case to show that the question of the safety or loss of the vessel ever presented itself to the mind of any one connected with the matter.

The case is precisely within the principle laid down by Judge STORY in his work on Equity Jurisprudence, where he says: "§ 150: In like manner where the fact is equally unknown to both parties; or where each has equal and adequate means of information; or where the fact is doubtful from its own nature; in every such case if the parties have acted with entire good faith a

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Respondent's points.

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court of equity will not interpose. For in such cases the equity is deemed equal between the parties; and, when it is so, a court of equity is generally passive, and rarely exerts an active jurisdiction." "§ 151: The general ground upon which all these distinctions proceed is, that mistake or ignorance of facts in parties is a proper subject of relief only when it constitutes a material ingredient in the contract of the parties, and disappoints their intention by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. It is strictly *damnum absque injuria*."

*Wheeler, Cortis & Godkin*, attorneys, and *Everett P. Wheeler* of counsel, for respondent, argued:—

I. (1.) Was the agreement to cancel the policy made upon the terms stated, as follows:

Str. "Samana."

NEW YORK, December 3, 1888.

Clause added to policy No. 31,466 of New York Mutual Insurance Co., issued to W. B. Duncan, Jr.:

At the request of the assured this policy is hereby canceled at and from December 3, 1888, at noon, *pro rata* premium to be paid for eight months not used, \$233.33. Approved.

President.

(2.) Was the steamship "Samana" seaworthy when she sailed from New York? (3.) Was she lost before noon of

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Respondent's points.

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December 3, 1888? On these points the learned judge found in favor of the plaintiff. Judgment was rendered for the full amount of the policy, \$5,000, less the return premium, \$233.33. When the agreement to cancel was made, December 3, 1888, the plaintiff had a valid claim upon the policy for a total loss, and there can be no question of the validity of the plaintiff's claim at the time. According to the defendant's contention, the agreement for cancellation was to relinquish a valid claim for \$5,000 in consideration of the payment of \$233.33. It is well settled that such an agreement is invalid, even though accompanied by the payment of a portion of the demand. *Bunge v. Koop*, 48 *N. Y.*, 225; *Coe v. Hobby*, 72 *Id.*, 141; *Smith v. Kerr*, 108 *Id.*, 31.

II. The defendant argued that in order to constitute a mistake for which a court would rescind a contract, it was necessary to show a positive and erroneous belief, and also to show that this mistake was mutual; or, in other words, that it existed in the minds of both parties. Neither of these propositions is applicable to the case of an action to rescind a contract. The facts in this case are undisputed. Mr. Duncan testified, referring to the cancellation of the policy: "I believed the steamship 'Samana' to be at that time in a place of safety." Mr. Bleecker testified that he "had no supposition on that subject." In the mind of one there was a positive error; in the mind of the other ignorance, which was equally an error. "The general rule is, that an act done or contract made under a mistake or ignorance of a material fact is voidable and relievable in equity." 1 *Story, Eq.* § 140. See also §§ 134, 141, 143, 143a. In section 142 it is said that in such a case equity relieves upon the ground that both parties intended the purchase and sale of a subsisting thing and implied its existence as the basis of their contract. Both Judge STORY, in section 209, and Chancellor KENT, 2 *Comm.* 468, quote from the civil law, as an illustration, the sale of a

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Respondent's points.

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house and lot under the supposition that the house was still in existence, whereas in point of fact it had been destroyed by fire. The rule thus stated is supported by the authorities. *Belknap v. Sealey*, 14 *N. Y.*, 143; *Marvin v. Bennett*, 26 *Wend.*, 169; *Bank of Commerce v. National Mechanics' Bank*, 55 *N. Y.*, 211; *Martin v. McCormack*, 8 *Ib.*, 331; *McKay v. Barber*, 37 *Geo.*, 423; *Young v. Cole*, 3 *Bing. N. C.*, 723. *Martin v. McCormack* cites with approval the case of *Hitchcock v. Gidding*, 4 *Price*, 135, which was a bill to rescind a contract for the conveyance of a remainder in fee expectant upon an estate in tail. A recovery which barred the entail had been suffered at the time of the contract. Both parties were ignorant of this, and the court held that this mutual mistake was a ground for rescission. *Rheel v. Hicks*, 25 *N. Y.*, 289. *Held*, that money paid under a mistake as to the existence of a material fact could be recovered back. The court quote with approval the language of Chief Justice SAVAGE in *Mowatt v. Wright*, 1 *Wend.*, 355. "Error of fact takes place," says the same learned judge, "either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist." The section in *Story's Equity* cited by Mr. Ward must be taken in connection with section 152, which treats of the reformation of a contract. In such case undoubtedly it must be made to appear that the contract as reformed does express the real intention of the parties. Equity will never make a contract for parties. But this is quite a different thing from rescinding the contract, leaving the parties to stand in the same position as they did before the agreement was made. The rule is this, equity will not reform a contract unless the mistake is proved to be the mistake of both parties, but may rescind and cancel a contract upon the ground of mistake of facts material to the contract of one party only. *Diman v. Providence R. R. Co.*, 5 *R. I.*, 130.

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Opinion of the Court, by McADAM, J.

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BY THE COURT.—McADAM, J.—Many of the legal principles affecting the rights and liabilities of the parties under the contract of insurance, have been settled adversely to the defendant, in an action by the plaintiff on a similar policy on the same vessel, issued by the China Mutual Insurance Company. See *Duncan v. China Mut. Ins. Co.*, 39 *State R.*, 248, *affd.* 41 *State R.*, 368. The new phase now presented is as to the effect of a cancellation of the policy after the loss of the vessel, and before either party knew of the fact. It is manifest that the parties intended to cancel the policy—not from the time of its original delivery, but on and after December 3, 1888, the day of the cancellation. The defendant retained the premium for the risk up to that time, and returned merely the unearned premium for the time unexpired. The vessel having been lost prior to the cancellation, the liability of the defendant had at that time become fixed and irrevocable. The plaintiff did not intend nor did the defendant expect to be released from any actual liability already incurred and then existing, but from any that might occur thereafter. The acts of the parties demonstrate this. If it had been intended to rescind the policy *in toto*, the entire premium would have been returned, for this was the consideration of the defendant's agreement. For here, as in *Baker v. Citizens' M. I. Co.*, 51 *Mich.*, 243, the policy was not canceled until after the loss and right of action accrued, and as was held in that case, "There is nothing in the mere act of cancellation to operate retroactively so as to cut off the claim for damages already existing." Perhaps the plaintiff required no equitable relief, if the surrender of the policy was intended to operate as to future liability only, but the plaintiff acted on the assumption that equitable relief was necessary to reinstate the parties to their former position, and the defendant not having raised the objection in its answer that equitable relief was unnecessary, cannot

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Opinion of the Court, by McADAM, J.

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raise that question now. *Town of Mentz v. Cook*, 108 *N. Y.*, 504; *Ostrander v. Weber*, 114 *Ib.*, 95. We will assume therefore that the plaintiff was properly in equity, and that that branch of the court obtained complete jurisdiction over the controversy. The plaintiff did not seek for *reformation*, so that the court was not called upon to make a new contract for the parties, but to *rescind* the cancellation, so as to reinstate the parties where the contract itself placed them. While equity will not reform a contract unless the mistake is proved to be the mistake of both parties, it may rescind and cancel a contract upon the ground of mistake of facts material to the contract of one party only. *Diman v. Providence R. R. Co.*, 5 *R. I.*, 130. That is this case. Story lays down the general rule, "that an act done or contract made under a mistake or ignorance of a material fact is voidable and relievable in equity." (*Story's Eq.*, §§ 134, 140, 141 to 143); and Pomeroy, in treating of the same subject, says the mistake or ignorance "must concern a fact material to the transaction, as that a certain matter or thing exists at the present time, which really does not exist: or that a certain matter or thing existed at some past time, which did not really exist." *Pomeroy's Eq.*, § 854. Chief Justice SAVAGE in *Mowatt v. Wright*, 1 *Wend.*, 355, on the same topic said, "that error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist which does not." In the present instance, both parties evidently acted on the supposition that the vessel was in existence, and hence contracted with reference to a subsisting thing, which in fact had no existence at the time. Neither party knew nor had any reason to believe that the vessel had foundered prior to the time of canceling the policy, and must have contracted without such knowledge or belief, and on the implication that it was still afloat and had an existence. In such a case—mutual mistake going to the essence of

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Opinion of the Court, by McADAM, J.

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the contract, equity may relieve however innocent the parties may be (*Story's Eq.*, § 142), and the same principle is carried into all contracts of whatever character, based on the existence of the subject matter thereof. Thus, if an article intended to be sold has no existence, there can be no contract of sale. If A. sells his horse to B., and it turns out that the horse was dead at the time, though the fact was unknown to the parties, the contract is necessarily void (2 *Kent's Com.*, 468), and the rule is in no way limited by the nature of the subject matter involved, but extends to anything capable of existence, and which the contract implies has an existence at the time it is made, *Dexter v. Norton*, 47 *N. Y.*, 62; *Kein v. Tupper*, 52 *Ib.*, 550. The setting aside of the cancellation seems warranted on equitable principles by the facts established. The insured certainly never intended to discharge an existing liability of \$5,000, in consideration of the return of an unearned premium of \$233.33, leaving in the possession of the insurer the premium for the risk up to and after the time the liability itself accrued, and effect should not be given to such a result where it is contrary to the manifest intention of the parties. *Sperry v. Miller*, 16 *N. Y.*, 407; *McGregor v. Bd. of Education*, 107 *Ib.*, 516, 517. The policy was surrendered, it is true, but there is no claim that it was destroyed or intended so to be, and the surrender in view of the facts, is consistent with the theory that it was made because customary, and as evidence that the liability kept alive till December 3, 1888, was not to continue after that date. The intention of the parties must characterize the act and interpret its meaning. The evidence as to seaworthiness, loss of the vessel prior to December 3, 1888, and damages, sustain the findings made by the trial court, and as there is no merit in the exceptions, but one question—that of interest—remains to be considered. The remedy invoked by the plaintiff was founded on the postulate

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Statement of the Case.

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that he had no action at law, until the cancellation was set aside. Following this supposition to its natural conclusion, the item of \$312.99 for thirteen months' interest should not have been allowed. Interest is in the nature of damages after default by the defendant, *Hanley v. Crowe*, 19 *State R.*, 828, and the theory of the suit (by which the plaintiff is of course bound), implies that he had no present cause of action until the cancellation was set aside. For the reasons stated, the judgment must be modified as to the item of interest, and affirmed as to the residue, without costs.

SEDGWICK, Ch. J.—I concur in the result.

FREEDMAN, J., concurred.

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CLARK R. GRIGGS, APPELLANT v. MELVILLE C.  
DAY, ET AL., AS EXECUTORS, ETC., RESPONDENTS.

*Referee's fees under the Code, when changed by the consent of parties, etc.*

The stipulation of the parties in writing provided "That the referee shall not be limited to the statutory fee of six dollars per day for his services in this case, but may charge such fees therefor as he deems proper.

The referee's charges in the case were objected to on taxation, on the ground that the stipulation failed to specify any *specific* rate of compensation, and, therefore, was not "*a different rate of compensation fixed by consent of the parties*," as provided by the Code. The clerk, as taxing officer, sustained the objection, and the special term judge, on appeal, sustained the clerk's ruling. *Held*, that this decision must be affirmed, under the construction of the Court of Appeals in *First National Bank v. Tamajo*, 77 *N. Y.*, 476, and *Mark v. City of Buffalo*, 87 *N. Y.*, 184, although the court in its opinion in this case considers the decision and construction of the Supreme Court in *Burt v. Oneida Community*, 59 *Hun*, 234, to be preferable for reasons cited in the opinion of the court, which fully sets forth the facts and points in this case.

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Statement of the Case.

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Before SEDGWICK Ch. J., and McADAM, J.

*Decided May 2, 1892.*

On the taxation of plaintiff's costs, the defendants objected to the item of \$7,500, the fee paid to the referee before whom the action was tried:

The plaintiff claimed the right to tax said charge, under a stipulation whereby it was agreed "That the referee shall not be limited to the statutory fee of six dollars per day for his services in this case, but may charge such fees therefor as he deems proper." The stipulation was reduced to writing and subscribed by the parties to be charged. The case involved large interests and was calculated to consume much of the referee's time, and was of such exceptional character that it was next to impossible to determine in advance what a reasonable compensation would be. The referee rendered his services, and the plaintiff paid the sum fixed by the referee, in good faith and in reliance upon the stipulation.

There is nothing to show that the charge is unreasonable. On the contrary, the nature of the litigation, the magnitude of the interests, the amount involved, the importance of the case, the voluminous testimony to be considered, the intricacy of the questions presented, all indicate that the sum charged is not extravagant, but fair compensation commensurate with the labor expended.

Indeed, the only objection urged against the charge, is that it was not taxable because the stipulation failed to specify any *specific* rate of compensation. The clerk sustained the objection, and the special term judge, on appeal from the clerk's ruling, affirmed the action of the clerk. From the order of affirmance the plaintiff appeals.

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Opinion of the Court, by MCADAM, J.

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*John McDonald*, attorney, and *Robert G. Ingersoll* and *John H. Post* of counsel, for appellant.

*William R. Bronk*, attorney and of counsel, for respondents.

BY THE COURT.—MCADAM, J.—It is a maxim of the law, that that is certain which may be made certain ; *certum est quod certum reddi potest* (*Co. Litt*, 43 ; 1 *Bouvier*, p. 214, subd. 3), and an agreement that the value of work done shall be fixed by a third person is valid and the amount so fixed recoverable. See *Del. & H. C. Co. v. Pa. Coal Co.*, 50 *N. Y.*, 250. The circumstance that the parties agreed that the value should be fixed by the referee would apparently lead to the conclusion that the sum so fixed was equally obligatory, unless the statutory provision as to referee's compensation, or the judicial nature of the position of referee, make it improper that he should determine the question.

Section 3296 of the Code, provides that a referee shall be paid six dollars for each day spent in the business of the reference, *unless a different rate of compensation* is fixed by consent of the parties. The Court of Appeals construed this section in *First National Bank v. Tamajo*, 77 *N. Y.*, 476, and in *Mark v. City of Buffalo*, 87 *N. Y.*, 184, by holding that the parties could not agree to leave the referee to decide the measure of his compensation, as that left the subject open and indefinite, and did not fix the *different* rate authorized by the Code provision before referred to. It has been urged that the determination of that point was unnecessary to the decision of either of those cases, and the remarks in reference thereto merely *dicta*. The suggestion is not without reason, yet the proposition decided is so clearly enunciated in the first case, and plainly reiterated in the second, that it would seem almost going counter to our appellate tribunal to hold

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Opinion of the Court, by McADAM, J.

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that that court did not intend to do precisely what it did in language too plain to be misunderstood. Good faith, however, would seem to require that where parties have deliberately entered into a written stipulation, and one has been induced on the faith thereof to part with \$7,500, that the other party to the contract should be rigidly held to its terms, for if not so held in this instance, the appellant must lose \$7,500 by the bad faith of the defendants in successfully repudiating their solemn obligation. None of the cases intimate that the agreement is contrary to public policy, and good morals would appear to require that it, like other contracts, be enforced according to its terms. It does seem that where parties have by a written agreement, stipulated that the referee shall fix the amount of his fees, they have expressly waived the statutory limit of six dollars per day, and have substituted a different rate of compensation, one not fixed by the Code, but equally certain, because the amount was to be determined in a mode agreed upon by the parties, and which was equally as specific when once fixed as if the exact amount had been specified in the agreement itself.

This view of the law was sustained by a majority of the court in *Burt v. Oneida Community*, 59 *Hun*, 234; S. C., 36 *State R.*, 765; 20 *Civ. Pro. R.*, 167, 12 *N. Y. Suppl.*, 806, which would be followed, but for the fact that the rulings made by the Court of Appeals, in the two cases cited, are so clearly opposed to the decision in *Burt v. Oneida Community*, *supra*, that we feel constrained to respect its instruction by affirming the order appealed from, with costs.

SEDGWICK, Ch. J., concurred.

Appellant's points.

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THE SIXTH NATIONAL BANK OF THE CITY  
OF NEW YORK, APPELLANT v. THE LORILLARD  
BRICK WORKS COMPANY, ET AL., RESPOND-  
ENTS.

Promissory note, defence thereto ; that it was made and endorsed without consideration for the accommodation of one Simmons, and diverted by him from the purpose for which it was entrusted to him, and the evidence fully supported that position and required the plaintiff to show that it paid value for the paper, and the single and main point in the case was whether, upon the evidence, the plaintiff was entitled to go to the jury upon the question as to whether it parted with value upon the faith of the note.

*Held*, that the evidence established that the plaintiff neither paid nor surrendered anything of value on the faith of the note in suit, and there was nothing to go to the jury on any of the questions involved in the action, and the verdict for the defendants was properly directed.

Before SEDGWICK, Ch. J., and McADAM, J.

*Decided May 2, 1892.*

Appeal from a judgment entered on the verdict of a jury directed in favor of the defendants, and from an order denying a motion for a new trial.

*Barlow & Wetmore*, attorneys, and *Francis C. Barlow* of counsel, for appellant, argued :—

I. Getting the notes discounted, and applying the cheques drawn against the proceeds in the way that these cheques were applied, has at least the same effect as though the notes had been applied directly for the same purpose. In fact, however, as shown in Point Third *infra*, our position is much stronger than it would be if the notes had been applied directly to the overdraft

## Appellant's points.

of Satterlee & Co. Therefore the question is whether the plaintiffs would have parted with value if they had taken \$21,210 worth of the notes in payment of the overdraft of John Satterlee & Co., and if they had taken \$6,413.46 worth of the notes in payment of the two Meyer notes and the Cochrane note. First as to the cheque for \$21,210, which was applied to the payment of the overdraft of John Satterlee & Co. Notwithstanding some apparent confusion in the cases, it is the settled law of this state that a person who takes negotiable paper in payment and satisfaction of an antecedent debt has parted with value and becomes the holder of the paper for value. This is held in the leading case in this State, *Coddington v. Bay*, 5 *Johns. Chan.*, 57 and 20 *J. R.*, 637. That case held that taking negotiable paper merely as security for an antecedent debt did not make the taker a holder for value, but, as the Court of Appeals says at p. 339 of 123 *N. Y.*, "it was explicitly conceded in *Coddington v. Bay* that taking paper in payment of an antecedent debt, makes one a holder for value." What Judge FINCH refers to in the case in 123 *N. Y.* is the statement at p. 646 of *Coddington v. Bay*, that if "some existing debt be satisfied thereby \* \* \* this would be paying value." Without going into all the cases, we refer to *Mayer v. Heidelberg*, 123 *N. Y.*, 332, where, at p. 339, the court sums up the law as follows: "The respondents rely upon two propositions: (1) That the actual payment and absolute discharge of an antecedent debt is a valuable consideration for the transfer of commercial paper, and cuts off prior equities \* \* \* I have no doubt as to the soundness of the first proposition. It was explicitly conceded in *Coddington v. Bay*, 5 *Johns.*, 57; 20 *Ib.*, 637, which originated the difference between the courts of this state and the concurring views of the federal court and those of England. While it was in that case ruled that the transfer of negotiable paper as collat-

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Appellant's points.

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eral security merely for an antecedent debt did not make the creditor a holder for value within the rule cutting off prior equities, it was yet asserted that such result followed where, among other things, some existing debt was satisfied thereby. And that, I think, was a natural and logical conclusion from the reasoning upon which the decision rested. The argument was that the holder of the paper merely as collateral lost nothing by its failure, since his debt all the time remained, his original position was unchanged, and he had simply failed to get an added security, himself parting with nothing. It is apparent that the reasoning fails, whenever, as a result of the new contract, the original debt has been actually extinguished, when the paper received has been both transferred and accepted as payment, and the debt has been discharged within and by force of the acts and concurring intention of both parties. And so we have steadily decided (citing cases). These cases, and many more like them, however differing in their facts, and although the earlier ones have been more or less criticised, yet agree, as I read them, in the doctrine that where the pre-existing debt is actually and absolutely extinguished in consideration of the negotiable paper transferred, the transferee is protected against prior equities." The confusion upon this subject has arisen chiefly from some careless and *obiter* remarks of Chancellor WALWORTH in *Stalker v. McDonald*, 6 *Hill*, 93, in the Court of Errors. In that case the paper was received merely as security for an antecedent debt, and not in payment of the debt. See statement of facts at p. 94, and by the chancellor at foot of p. 111. But all doubt (if there ever were any), upon that subject is now set at rest by *Mayer v. Heidelberg*, 123 *N. Y.*, 332 and at p. 339, from which an extract is quoted above. Now in the case at bar the cheque for \$21,210 was applied "in payment" of the overdraft of Satterlee & Co., and was so entered on the plaintiffs' books.

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Appellant's points.

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The cheque for \$21,210 was charged to the account of Simmons the drawer, going, with the cheque for \$6,413.46, to make up the whole of the proceeds of the discount, and on the same day the cheque was credited to John Satterlee & Co. on their overdraft. Mr. Jordan acting for Simmons directed that the cheques should be applied as they were applied. There is no contradiction about the facts in the matter, but if there had been we were entitled to go to the jury upon the facts. Our request to go to the jury was improperly refused unless it be the law that taking negotiable paper in absolute payment of a debt, does not make the taker a holder for value.

II. There remains to be considered the fact that the plaintiffs did not give up to Satterlee & Co. the \$30,000 cheque the return of which produced the overdraft. The fact is that the cheque was given to the United States Attorney to be used in the criminal proceeding, but apart from that fact it is utterly immaterial whether the \$30,000 cheque was surrendered or not. All that can be said is that it is a circumstance which the jury might consider in determining whether the overdraft was really paid. If the jury believed on the whole evidence that the cheque for \$21,210 was taken in payment, it would make no difference whether the \$30,000 cheque was surrendered or not. When a debt is paid by taking paper, it is absolutely gone, and if the paper cannot be enforced the debt is lost. When the paper instead of being taken in absolute payment of the debt is taken merely as security, of course the rule is otherwise, since the debt is not gone. If this debt were in fact paid as we prove, by the check, the plaintiffs can never enforce it against John Satterlee & Company, nor could they collect the \$30,000 check. If, in considering the question whether new paper is taken in absolute payment or satisfaction of the old paper, or merely as additional security, the fact that the creditor retains the

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Appellant's points.

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physical custody of the old paper conclusively shows (instead of being a mere circumstance), that the transaction was not payment, it must also be held that surrendering up the old paper conclusively shows that the transaction was a payment. But this is not the law. In *Olcott v. Rathbone*, 5 *Wend.*, 491, a bank upon receiving a cheque surrendered up the old note, but it was held that the surrender did not show that the cheque was taken in absolute payment of the note, and that, the check not being paid, the bank might recover upon the surrendered note. The rule is that where the creditor receives paper of a person other than the debtor on account of the debt, the debt is not satisfied and extinguished by the paper unless the parties shall so agree, and the burden is upon the debtor to show that the paper was taken in absolute payment. *Noel v. Murray*, 13 *N. Y.*, 167. As the surrender of the old paper does not conclusively show that the new paper was taken in absolute payment, so the failure to surrender the old paper does not conclusively show that the new paper was not taken in absolute payment. *Olcott v. Rathborne* has been repeatedly followed. *Bank v. Morgan*, 6 *Hun.*, 346, affirmed 73 *N. Y.*, 593; *Bank v. Webb*, 39 *N. Y.*, foot of p. 330 and top p. 331; *Powell v. Charless*, 34 *Mo.*, 485, and at p. 495; *Hubbard v. Surney*, 64 *N. Y.*, 467. And the *Auburn City National Bank v. Hunsiker*, 72 *N. Y.*, 252, shows that retaining the old paper does not conclusively show that the new paper was not taken in absolute payment of the old. There, upon the delivery to the bank of the new note, the old note was retained by the bank, and it was marked "paid," and entered as paid in the books of the bank. A controversy arising whether the new note was taken in absolute payment of the old note, the Court of Appeals held that it was a question of fact for the jury upon all the circumstances.

III. We have discussed the case as though Simmons,

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instead of getting the note in suit and the other six notes discounted, and using the proceeds as he did, had taken these notes directly to the plaintiff's bank and delivered \$21,210 of them to the bank in payment of the overdraft of John Satterlee & Co. We claim that in that case it would have been for the jury to say whether the bank did not take the notes in absolute payment and satisfaction of the overdraft, and if this were found to be the fact, we claim that the bank would be a holder of the notes for value paid. In the case supposed, the plaintiffs would have taken the notes of third persons in payment of an antecedent debt (the overdraft), due to it from a customer, and it would be for the jury to say whether the transaction was payment of the debt. But Satterlee having got the notes discounted, and having delivered to the bank his cheque upon itself in payment of the overdraft, and the bank having accepted it as such payment and charged it against the account of the drawer and credited it to Satterlee & Co., there is a series of decisions in the Court of Appeals which conclusively establish that the transaction *ipso facto* extinguished the debt of the bank to Simmons and acted as a satisfaction of the debt of Satterlee & Co. to the bank upon the overdraft. The Court of Appeals say that such a transaction is precisely the same in its effect as though Simmons had drawn out this \$21,210 in money and had then brought it to the bank to pay the overdraft, in which case no one could deny that the bank had paid out that amount of the proceeds of the discount. And the same is true in regard to the cheque for \$6,413.46 which went to pay the two Meyer notes and the Cochran note. In *Pratt v. Foote*, 9 *N. Y.*, 463, the plaintiff (a bank), held a note made by the defendants and endorsed by one Scudder, and a few days before it became due the defendant got Scudder's cheque for the amount drawn upon the plaintiffs' bank and delivered it to the bank to take up the note. The bank accepted

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it and credited it as a payment of the note, but afterwards erased the credit (applying to other purposes the deposit of Scudder, who had become insolvent), and then sued Foote the maker upon a new note which he had given in place of the old one upon being told by the bank that the old one had not been paid. The bank contended that Scudder's cheque had not paid the note because it was not proved that the bank had accepted it in absolute payment, but the court distinguished between the effect of a bank's taking the cheque or paper of a third person on account of a debt (which would have been the case if Simmons had delivered the discounted notes directly to the plaintiff in this case), and the bank's taking a cheque drawn upon itself in payment of a debt due to itself, and the court holds that in the latter case it is not necessary, as it would be in the former, to show by evidence *aliunde* that the cheque was taken in absolute payment, but that the legal effect of the transaction was the same as it would have been had the money been drawn out upon the cheque and paid in satisfaction of the paper. In *Mayer v. Heidlebach*, 123 *N. Y.*, 332, the court approves and follows *Pratt v. Foote*. In *Oddie v. Bank*, 735, *Pratt v. Foote* is approved and followed, and near the foot of p. 741, the court say: "The legal effect of the transaction was precisely the same as though the money had been first paid to the plaintiff and then deposited," or, as in the case at bar, paid by Simmons on the overdraft.

IV. What has been said applies to the cheque of \$6,413.46. That cheque was given by Simmons in payment of the two Meyer notes for \$2,500 each, and in part payment of the Cochrane note for \$3,000. And it was charged against the account of Simmons, together with the cheque for \$21,210. Under the doctrine of *Pratt v. Foote* the application of the cheque for \$6,413.46 rests upon precisely the same ground as the application of the other cheque, that is, it is the same

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in legal effect as though Simmons had drawn out the amount of the cheque and paid the money on the three notes, on two of which he was an endorser prior to the Meyers. And even if, instead of procuring the seven notes (including the note in suit), to be discounted, and paying the proceeds to the extent of \$6,413.46 on the two Meyer notes and the Cochrane note (which is unquestionably a payment of those three notes under the doctrine of *Pratt v. Foote*), Simmons had applied the notes which were discounted, to the extent of \$6,413.46, directly to pay or take up the Meyer notes and the Cochrane note, there could have been no question that the plaintiffs would have been holders for value of the former notes, provided the two Meyer notes and the Cochrane note had been actually surrendered to Simmons. The plaintiffs then would have come directly within a long line of cases. See *Young v. Lee*, 12 *N.Y.*, 551; *Park Bank v. Watson*, 42 *Ib.*, 490; *Brown v. Leavitt*, 31 *Ib.*, 113, and at p. 114; *Pratt v. Cowan*, 37 *Ib.*, 440; *Paddon v. Taylor*, 44 *Ib.*, 371; *Clothier v. Adriance*, 51 *Ib.*, 322; *Day v. Saunders*, 1 *Abb. Ct. App. Decisions*, 495. But we have sought to show above, that the mere fact that the Meyer notes were not given up does not conclusively show that they were not paid, or that the cheque for \$6,413.46 was not taken in lieu of the three notes. The cheque for \$6,413.46 was, as directed by Simmons through Jordan, applied to the payment of the two Meyer notes and in part payment of the Cochrane note for \$3,000. This was certainly sufficient to go to the jury, and whether the cheque for \$6,413.46 is to be considered as a payment of the two Meyer notes and a part of the Cochrane note, or as a substitution of the cheque for these notes, is wholly immaterial. And in the case at bar the Meyer notes stand as business paper, paper given for a valuable consideration, as is above pointed out. But the result would be the same even if the Meyer notes were accommodation

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paper, so long as they had not been diverted. Accommodation paper is of course always made or endorsed without consideration between the immediate parties, but unless its use is restricted the person for whose accommodation it is made or endorsed may use it in any manner that he sees fit, and when the accommodation party issued upon it it is no answer for him to say that he got no consideration for it, unless it has been diverted. The person to whom it is given may pledge it as security for an antecedent debt, and yet the creditor can enforce it. *Robbins v. Richardson*, 2 *Bos.*, 248; *Seneca County Bank v. Neass*, 3 *N.Y.*, 442; *Grocers' Bank v. Penfield*, 69 *Ib.*, 502; *Freund v. Bank*, 76 *Ib.*, 352. There is no evidence that at the time the plaintiffs took the cheque for \$6,413.46 they had any knowledge or suspicion that the note in suit was diverted accommodation paper, or accommodation paper at all, and if the plaintiffs had taken the note in suit directly in payment of or in place of the Meyer notes, it could not be pretended that the Meyer notes were not a sufficient consideration for the note in suit. And, under *Pratt v. Foote*, *supra*, the case is still stronger.

*Glover, Sweezey & Glover*, attorneys, and *Richard L. Sweezey* of counsel, for respondents, argued :—

I. Defendants having shown accommodation and diversion of the note, the burden was upon plaintiff to prove that it took the note in due course of business without notice, and actually parted with value upon the faith thereof. *Comstock v. Hier*, 73 *N. Y.*, 269; *Canajoharie Nat. Bk. v. Diefendorf*, 123 *Ib.*, 191.

II. The mere formal discounting of the notes and passing the proceeds to the credit of Simmons upon the books of the bank did not make the bank a holder of the notes for value as against an accommodation maker and endorser of diverted paper. The bank must have actually paid out and parted with the proceeds of the dis-

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count. *Central Nat. Bank v. Valentine*, 18 *Hun*, 417; *Platt v. Chapin*, 49 *How.*, 318. Practically, all the plaintiff did in the case at bar was to take two cheque from Simmons to its own order, together aggregating the amount of the proceeds of the discount. One of these it credited as a nominal book-keeping payment to the account of John Satterlee & Co. Under the well settled law of this state such a book-keeping entry constituted no parting with value. *Phoenix Ins. Co. v. Church*, 81 *N. Y.*, 218; *McQuade v. Irwin*, 39 *Supr. Ct.*, 396; *Burnham v. Baylis*, 14 *Hun*, 608. But it may perhaps be urged that a different presumption as to payment arises in respect to the receipt and crediting by a bank of a cheque drawn upon itself. Conceding that such may be the fact in certain cases, the one at bar is clearly not such a case. The debit balance of the Satterlee account was produced by the act of the bank in charging against this account a cheque for \$30,000 of some third party deposited by Satterlee & Co. on the 28th of January, 1890, which came back through the clearing house on the 29th unpaid. If the \$21,210 cheque was intended to be accepted by plaintiff in absolute payment of anything it was the amount remaining unpaid upon this returned cheque for which it held Satterlee & Co. responsible by reason of the firm's endorsement thereof at the time of its deposit. But while nominally crediting the Simmons cheque to the unpaid balance of the Satterlee account, it took pains to hold on to the returned cheque, thereby retaining its claim against Satterlee & Co. if the Simmons cheque should not prove to be good to the bank by reason of failure of the title of the bank to the notes discounted for Simmons's account and negating any possible presumption that the crediting of this Simmons cheque was intended to be an absolute payment of the returned cheque. The tentative character of the transaction further appears from the fact that the bank never canceled the two Simmons

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cheques upon its iron file, according to the custom of banks respecting paid cheques, and kept these cheques also in its possession. Furthermore, there is really no evidence in the case that Satterlee & Co. ever had anything to do with this transaction. The cheque for \$21,210 was payable, not to Satterlee & Co., but directly to plaintiff. That Conrad N. Jordan, who handed the cheque to plaintiff, had any authority or claimed to have any authority to represent Satterlee & Co., there is not a particle of evidence. That the bank intended to part with nothing but to hold on to everything and to its claims against everything is too apparent for dispute. The other Simmons cheque for \$6,413.46 the bank, in order to make some excuse for its possession, entered as a nominal payment of three notes included in this very discount and none of which had yet matured. The utter sham character of this pretended payment is shown by the fact that the bank retained all three notes, collected one at maturity and brought suit on the other two, which suit is still pending. Although it was claimed that the commencing of this suit was a mistake, it appeared that after the discovery of the alleged mistake the suit was noticed for trial, and no offer has ever been made to surrender these notes. But if the bank had surrendered the notes under the circumstances it would have constituted no parting with value. If a bank discounts a note and passes the proceeds to the credit of its customer and then takes a cheque back from the customer for the amount of the proceeds and surrenders up the note, wherein does such surrender of the note constitute any parting with value?

III. Defendant was entitled also to a direction upon the ground that plaintiff failed to prove want of notice of the character of the notes in suit. The burden was on plaintiff to prove not only that it parted with value, but that at the time it so parted with value it had no notice of the equities, *Canajoharie Nat. Bk. v. Diefendorf*,

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*supra*. If the bank parted with any value it was not at the time the discount was made, but on the 6th of February when it received the cheques. There is not a particle of evidence in the case to show that at this time the bank did not have notice of the facts respecting this paper. The persons then in charge of the bank had certainly acquired knowledge of the rascally character of the parties who had been in possession of the bank at the time the paper was taken.

IV. Plaintiff's paying-teller was clearly right when he testified that plaintiff had parted with nothing upon the faith of the note in suit, and the judgment and order appealed should be affirmed, with costs.

BY THE COURT.—McADAM, J.—The action is on a past due promissory note for \$5,000 made by the Lorillard Brick Works Company to the order of James A. Simmons and endorsed by him and by Jacob Lorillard and passed before maturity to the credit of said James A. Simmons on the books of the plaintiff. The evidence established the fact that the note was made by Lorillard in the name of the Brick Company (he being its President) and endorsed by him individually, all for the accommodation of Simmons, and that it was diverted by him from the purpose for which it was intended. This made it necessary for the plaintiff to show two things. *First*. That the plaintiff paid value for the paper. *Second*. That the plaintiff had no notice that the paper had been diverted. *Comstock v. Hier*, 73 *N. Y.*, 269; *Vosburgh v. Diefendorf*, 119 *Ib.*, 357; *Canajoharie Nat. Bk. v. Same*, 123 *Ib.*, 191. The plaintiff proved want of notice of the diversion, and the contest narrowed itself down to the single question, whether the plaintiff paid value for the paper within the meaning of that term as declared by the courts. The mere formal discounting of the note, and passing the proceeds to the credit of Sim-

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mons upon the books of the bank did not make the plaintiff a holder for value as against the accommodation maker and endorser of diverted paper. The plaintiff must have actually paid out and parted with the proceeds of the discount before it could acquire an indisputable title thereto. *Central Natl. Bk. v. Valentine*, 18 *Hun*, 417; *Platt v. Chapin*, 49 *How.*, 318. The plaintiff concedes the proposition stated, but claims to have paid out the proceeds within the meaning of that term as decided by the cases of *Pratt v. Foote*, 9 *N. Y.*, 463, and *Mayer v. Heidelberg*, 123 *Ib.*, 332. Those cases hold substantially, that where a pre-existing debt has been actually and absolutely extinguished in consideration of the transfer of negotiable paper, the transferee is a holder for value within the rule protecting such holder against prior equities. In *Pratt v. Foote*, *supra*, it appeared that the Prattsville Bank (owned by the plaintiff) held the defendant's note for \$1,000 and interest, payable to and endorsed by Samuel Scudder. That five days before the note matured, the defendant called at the bank with Scudder's check on the bank for the amount of the note and interest (payable on the day the note fell due), and proposed to the cashier that he should take the cheque and give up the note which the latter declined to do. It was then agreed that the cheque should be left, that the cashier should pin it to the note, and if Scudder's account was made good on the day both fell due, the cheque would pay the note. Five days after the note matured several sums were credited to Scudder, more than sufficient to meet the cheque, which was thereupon charged to Scudder's account, and the note posted in the bill-book and tickler as paid, and the charge of the cheque to Scudder was posted from the cash-book into the ledger. The maker of the note in that case interested himself in its payment, and could on the day the credit was made, have withdrawn the money from the bank on Scudder's cheque, and returned it in extinguish-

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ment of the note, if the bank had required him to do so, and the court held that in legal effect the same result was produced by the mode which the bank adopted.

In *Mayer v. Heidelberg*, *supra*, the proposition decided, was that where a depositor in a bank, having sufficient funds standing to his credit, tenders to the bank a cheque in payment for negotiable paper it has for sale, and the bank accepts the cheque, charges it against the deposit, cancels and files it as a voucher, and delivers over the paper purchased, the purchaser is a holder for value, the antecedent debt of the bank being *pro tanto* actually and in fact extinguished.

In the present instance, there was no agreement whereby any other obligation was to be paid with the moneys credited to Simmons, as in the Pratt case, and no delivery up of other securities as in the Mayer case. Practically all the plaintiff did in the case at bar, was to take two cheques from Simmons to its own order, together aggregating the amount of the proceeds of the discount. One of these it credited as a nominal book-keeping payment to the account of John Satterlee & Co. (a firm in which Simmons was a member). The debit balance of the Satterlee account was produced by the act of the bank in charging against this account a check for \$30,000 of some third party deposited by Satterlee & Co. on January 28, 1890, which came back through the clearing house on the 29th unpaid. While nominally crediting the Simmons cheque to the unpaid balance of the Satterlee account it held on to the return cheque, thereby retaining its claim against Satterlee & Co. if the Simmons cheque should not prove good to the bank by reason of failure of the title of the bank to the notes discounted for Simmons' account, thereby negating any presumption that the crediting of this Simmons cheque was intended to be an absolute payment of the returned cheque. The tentative character of the

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Statement of the Case.

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transaction further appears from the fact that the bank never canceled the two Simmons checks upon its iron file, according to the custom of banks respecting paid checks, but kept these checks also in its possession. In short, the plaintiff surrendered nothing on the faith of the note in suit, its position will not in a legal sense be changed for the worse by its failure to recover anything upon it, and it cannot by its own volition on any *ex parte* system of credits or debits conjure up a theory of payment or satisfaction, not manifested or intended by the other parties to the transaction. The book-keeping entries constitute no parting with value within the rule making a plaintiff a bona-fide holder, so as to exclude existing equities between the parties. *Phoenix Ins. Co. v. Church*, 81 *N. Y.*, 518; *McQuade v. Irwin*, 39 *N. Y.*, *Superior Ct.*, 396; *Buhrman v. Baylis*, 14 *Hun.*, 608, and other cases before cited. There was nothing to go to the jury on any of the questions involved, and the verdict in favor of the defendant was properly directed, and the judgment entered thereon, and the order denying the motion for a new trial, must be affirmed with costs.

SEDGWICK, Ch. J., concurred.

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LOUISE MULLER, RESPONDENT v. THE ORDEN  
GERMANIA, APPELLANT.

*Representations and warranty of applicant for health and life insurance  
—Certificate of death by Health Board and attendant physician, how  
far evidence of facts therein stated beyond that of death.*

Plaintiff is the beneficiary named in a certificate of membership issued by plaintiff, by the terms of which \$1,000 became payable to plaintiff on the death of her sister. The decedent was admitted to membership December 26, 1888, and died March 24, 1890. In her application for

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membership she represented herself to be in good health and not suffering from cancer. There was a breach of the warranty contained in the application, as claimed by defendant, based upon the certificate of death that was furnished by Dr. Lewis, her attendant physician, on March 24, 1890, which stated that the chief cause of death was cancer of the uterus, and the duration of the disease two years, which would indicate that the decedent had been troubled with that disease prior to and at the time of her application and admission as a member of defendant's society. The main question in the case, is whether such certificate, unimpeached and uncontradicted, conclusively established the breach of warranty claimed by the defendant.

*Held*, that the statement in the certificate must be taken rather as an expression of opinion of the physician, and as such, in no sense conclusive evidence of the fact stated. There is nothing in the act of 1882 (§ 604) requiring the physician to certify to the "duration of the disease," so that his opinion that the duration of the disease was two years was not called for by article 9, section 1, of the constitution and by-laws of the defendant, interpreted in the light of the statute; hence such opinion does not rise to the dignity of evidence *prima facie* or otherwise. Upon the submission to the jury of this question upon the evidence and the verdict, finding there was no misrepresentation by the decedent, and that she was not in ill health at the time she joined the order, the judgment and order appealed from must be affirmed. No error found in the case.

Before SEDGWICK, Ch. J., and McADAM, J.

*Decided May 2, 1892.*

Appeal from judgment in favor of the plaintiff on verdict of a jury, and from an order denying a motion for a new trial.

*Meyer Auerbach*, attorney, and *Lewis Sanders* of counsel, for appellant, argued:—

I. Plaintiff's decedent warranted the truth of the representations contained in her application for membership. *Smith v. Aetna Life Ins. Co.*, 49 N. Y., 213. "I warrant that all answers in this application for membership are true and correct." "I am satisfied that such a (false?) statement shall be sufficient for the withholding of the benefits and all obligations of the Orden

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Germania." And she warranted that she was "in good health and not suffering from cancer."

II. The admissions contained in the Health Board's certificate are fatal to plaintiff's case. Plaintiff, by decedent's express contract with defendant, was required to furnish a certificate from the board of health before any claim against defendant accrued. The certificate showed that the deceased died of cancer of the uterus, and that the duration of the disease was two (2) years. That the certificate in question was the identical one furnished defendant by plaintiff's husband is not denied by him, and is positively sworn to by defendant's grand financial secretary as the only certificate from the board of health which he received in this case. The contract required the same to be furnished and the certificate of death thereby became *prima facie* evidence of the truth of the facts herein stated. "The preliminary proof presented to an insurance company in compliance with the conditions of the policy of insurance are admissible as *prima facie* evidence of the facts stated therein against the insured and in behalf of the company." *Insurance Co. v. Newton*, 22 *Wall.*, 32.

*Charles Steckler*, attorney, and *Alfred Steckler* of counsel, for respondent, argued:—

I. Good standing and part payment proven. It was proven and conceded that the deceased member was in good standing at the time of her death, and that \$200 was paid by the defendant to the plaintiff on account of the claim herein. In order to make out a *prima facie* case, all that was necessary for the plaintiff to prove was: (1.) The membership of the deceased. (2.) The designation of the plaintiff as the beneficiary. (3.) The death of the member. (4.) That the member at the time of death was in good standing. (5.) Part payment and recognition of the claim by the defendant. These facts having been proven, the burden was shifted

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to the defendant to prove that at the time of the member's admission she falsely represented her condition of health, and it, therefore, became unnecessary to produce the certificate of death issued by the board of health. By the defendant paying a part of the claim it recognized its validity and waived a strict compliance of its constitution and by-laws. An insurance company may waive any of the provisions of its policy. So can a benevolent corporation waive any portion of its by-laws and constitution. *Bodine v. Exchange Fire Ins. Co.*, 51 *N. Y.*, 117; *Goodwin v. Mass. Mut. Life Ins. Co.*, 73 *Ib.*, 490; *Hotchkiss v. Germania Fire Ins. Co.*, 5 *Hun*, 100; *Shaft v. Phoenix Life Ins. Co.*, 8 *Ib.*, 632; *Sheldon v. The Atlantic Fire Ins. Co.*, 26 *N. Y.*, 466; *Whitehead v. Germania Fire Ins. Co.*, 76 *Ib.*, 416.

II. As to the statement in the death certificate that the deceased died of cancer of the uterus, and that the disease was of two years' duration. The certificate issued by the board of health is not evidence of the cause of death, but only of the fact of death (see *Buffalo Loan, etc., v. Knights Temp. Assn.*, 56 *Hun*, 303). This case distinctly decided that where the by-laws require notice of death the statement in the certificate of the physician as to cause of death is inadmissible, even where such cause voids the policy. The by-laws of the defendant provide only for the delivery of the certificate of death. They do not provide that the entire contents of the certificate shall be evidence in their favor, nor do they provide that the certificate shall be used for any other purpose than to prove that death has actually occurred. The certificate is simply a notice of death and so intended to be by the by-laws. The certificate exercises no other function and is evidence of nothing else. But, if it should be held as proving the cause of death, its statements contained therein, viz., that the deceased died of cancer of the uterus and that the disease was of two years' duration, are rebutted by the evi-

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dence of Conrad Muller. He testified that Dr. Lewis (he it was who made the certificate from which the board of health issued the certificate) never attended the deceased before her last illness; that he never treated her before that. This evidence raised an issue of fact whether Dr. Lewis had certified to the truth that the disease was of two years' duration. This statement was evidently untrue, for the doctor had never seen or attended the patient before the 18th of October, 1889, and her death occurring five months later, and on the 24th of March, 1890. And besides, Doctor Lewis in the board of health certificate corroborates Conrad Muller. For in the certificate he certifies that he attended the deceased from October 18th, 1889, to March 24th, 1890, the day of death. Whether or no these statements set forth in the certificate were competent evidence, the defendant has had the benefit thereof, for this was the only evidence tending in any way to show that the deceased had been afflicted with cancer, and the jury having found on that issue in favor of the plaintiff, the defendant cannot now complain.

BY THE COURT.—McADAM, J.—The defendant is a benevolent corporation, and the plaintiff the beneficiary named in a certificate of membership therein, issued to her sister, by the terms of which the sum of \$1,000 on her death became payable to the plaintiff.

The decedent was admitted to membership December 26, 1888, and died March 24, 1890. In her application for membership, she represented herself to be in good health and not suffering from cancer.

It is claimed that there was a breach of the warranty, because it appeared by the certificate of death furnished by Dr. Lewis, her attending physician, on March 24, 1890, that the "chief cause of death was cancer of the uterus, and the duration of disease two years," which would indicate that the decedent had been troubled with

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that disease for about nine months prior to her admission as a member of the order. The certificate was offered in evidence by the defendant, and the question presented is whether such certificate, unimpeached and uncontradicted, conclusively establishes the breach of warranty pleaded by the defendant. Dr. Lewis, the physician who gave the certificate, never attended the decedent till October 18, 1889, five months preceding her death, so that the statement in the certificate that the duration of the disease was two years, was not founded on actual knowledge of the fact, and must be taken rather as an expression of opinion, and as such in no sense conclusive evidence of the fact stated.

True, the plaintiff was required as a condition precedent to the enforcement of her claim, to present a certificate of death issued by the board of health. The purpose of this certificate was to establish the death of the member, proof in this form being alone acceptable. There is nothing, however, in this requirement making the mere opinion of the attending physician conclusive evidence, as to the duration of the disease he was professionally called upon to heal.

The preliminary proofs presented to an insurance company in compliance with the conditions of the policy of insurance are admissible as *prima facie* (not conclusive) evidence of the facts stated therein against the insured and in behalf of the company. *Ins. Co. v. Newton*, 22 *Wall.*, 32. The Court of Appeals in commenting upon this case said, "It may be inferred that the whole (proofs) were verified by the claimants, and that they were called for by the contract of insurance." *Goldschmidt v. Mutual Life Ins. Co.*, 102 *N. Y.*, 493. If so verified they might be considered as admissions made by the claimants, and as such evidence of the facts presented.

In *Buffalo L. T. & S. D. Co. v. K. T. & M. M. A.*, 126 *N. Y.*, 458, it was held that the statute and ordinances

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requiring attending physicians in Buffalo to furnish certificates setting forth the cause, date and place of death of any person under their charge, were police regulations, and the records required for local and specific purposes, not public records in such sense as make them evidence between private parties of the facts recorded.

The Consolidation Act of 1882 (§ 604) applicable to the city of New York, requires that "Physicians who have attended deceased persons in their last illness shall, in the certificate of the decease of such persons, specify, as near as same may be ascertained . . . . the direct and indirect cause of death of such deceased persons."

There is nothing requiring the physician to certify to the "duration of the disease," *expressio unius, exclusio alterius*, so that the opinion of the attending physician that the duration of the disease was two years, was not called for by Art. IX., § 1, of the constitution and by-laws of the defendant, interpreted in the light of the statute before referred to. Hence such opinion does not rise to the dignity of evidence *prima facie* or otherwise. Certificates given by public officers are evidence only of the facts which they are required to record; as to other matters, they are extra-judicial and must be rejected. *Greenl. Ev.*, § 498. In *Buffalo L. T. & S. D. Co. v. K. T. & M. M. A. A.*, 56 *Hun*, 304, the court held, that "there is no rule making the records or books of the board of health evidence as to the *cause* of death on the trial of an action at law where that question is material. Nothing but common-law evidence would defeat a recovery in the absence of a statute or constitutional provision making other evidence competent." So, in *Hoffman v. N. Y. C. & H. R. R. Co.*, 46 *N. Y. Superior Ct. R.*, 526, *Affd.* 87 *N. Y.*, 23, it was held, "that records kept at a police station and hospital showing injuries received by plaintiff by an accident, are not admissible in evidence against him in an action for

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damages for such injuries, it not appearing *that the entries therein were made by persons having knowledge of the facts, or from statements of the plaintiff.*"

The defendant on the motion to dismiss the complaint objected to the absence of certain evidence which was afterwards supplied, so that any possible error in the ruling was effectually cured. *Bartholomew v. Lyon*, 67 *Barb.*, 86; *Barrick v. Austin*, 21 *Ib.*, 241; *S. & S. P. R. Co. v. Thatcher*, 11 *N. Y.*, 102; *Colegrove v. H. & N. H. R. R. Co.*, 6 *Duer*, 382.

The defendant recognized the validity of the plaintiff's claim by paying \$200 an account thereof before suit brought, and the litigation concerned \$800, the balance due. Upon the conclusion of the proofs, the trial judge sent the case to the jury under a clear and concise charge whereby he instructed them, that if they found that the decedent in her application for membership made any false statement or representation regarding her then state of health, or if she was afflicted with disease at that time, they should find for the defendant. The burden of proving the breach of warranty pleaded was on the defendant, and the submission of the question to the jury was put as strongly in favor of the defendant as it could expect or language make it. The jury found that there was no misrepresentation and that the decedent was not in ill health when she joined the defendant's order, and found a verdict in favor of the plaintiff for the balance due with interest.

We find no error, and the judgment and order denying the motion for a new trial must be affirmed, with costs.

SEDGWICK, Ch. J., concurred.

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Statement of the Case.

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WILLIAM E. COFFIN, ET AL., RESPONDENTS v. THE  
PRESIDENT AND DIRECTORS OF THE GRAND  
RAPIDS HYDRAULIC COMPANY, APPELLANT.

*Promissory notes, defences thereto.*

Three actions, to recover on three promissory notes, the facts in each of which are similar, so that all the questions involved in the three cases are considered and disposed of by a decision in one.

*Held*, that the issues in these actions were simple, and all the complications arose from the efforts of the defendant to present facts and questions in defence of the action that are not raised by the pleadings nor germane to the controversy before the court, yet requiring the court to state all the issues raised and the points claimed by the defence, that the propositions involved may be intelligently considered and understood.

After such statement, and a full review of the facts and points, the court held, that the plea of payment and satisfaction set up in the answer was not proved, and apart from the complications of fact and law, thrown into the case by the defendant, there does not seem to have been a shadow of a defence established.

The objection that the plaintiff could not maintain the action is untenable. If the defendant intended to raise the objection that the plaintiffs were not the real parties in interest, it should have been pleaded in defence. There was no real substantial or meritorious defence to the action, and the verdict directed by the court in each case merely gives effect to the legal rights and obligations of the parties.

Before SEDGWICK, Ch. J., and McADAM, J.

*Decided May 2, 1892.*

There are three actions, the facts in each of which are similar, except, as to date of the obligation, time when due, amount, and parties plaintiff, so that the questions involved in the three cases may be disposed of by the decision of one. The trial judge directed verdicts

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Appellant's points.

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in favor of the plaintiffs. In the first action for \$83,096. In the second for \$34,860, and in third for \$1,985.40. The defendant appeals from the judgments entered on the verdicts, and from orders denying motions for a new trial. The opinion will be directed to the facts presented by the record in the first action, as the disposition made of that disposes of the other two appeals.

*E. T. Lovatt*, attorney, and *Frederick R. Coudert* and *David Keane* of counsel, for appellant, argued.

I. The plaintiffs were not in a position to sue or successfully maintain an action upon the note herein, since they had not averred nor proved the performance of the condition precedent contained in said note. The condition precedent in the note: "One month after date, and upon the return of security given, we promise to pay Coffin & Stanton, agents, etc.," imposed upon the plaintiffs the duty of alleging and the burden of proving that they had offered to "return" the "security given or had returned the same." Plaintiffs failed to do either; hence the action would not lie and the court should have granted the motion to dismiss the complaint. If the payment of the note is "conditional, maturity arrived upon the performance of the condition." 2 *Am. and Eng. Ency. of Law*, p. 397; *Henry v. Coleman*, 5 *Vt.*, 402; *Brewster v. Williams*, 2 *So. Car.*, 455; *McNinch v. Ramsey*, 66 *No. Car.*, 400. This is not a negotiable promissory note, but is a conditional promise or agreement, and performance must be alleged and proved or the action will not lie. "Where the 'certificate' is payable on the return of 'this certificate,' it is negotiable, because that merely requires, as in case of any note, the return of the evidence of debt (*Frank v. Wessels*, 64 *N. Y.*, 158); but if there be added 'and the return of my guaranty of a certain note' it would engraft a collateral condition which would defeat the nego-

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tiability of the instrument." Vol. 1, *Daniel on Neg. Instr.*, § 45; *Cushman v. Haynes*, 20 *Pick.*, 132; *Tooker v. Arnoux*, 76 *N. Y.*, 397; *Benedict v. Cowden*, 49 *Ib.*, 396; *Smilie v. Stevens*, 39 *Vt.*, 316; *Blood v. Northrup*, 1 *Kansas*, 29. "The acceptors could not take up the note until it was presented, nor were they bound to pay the money till the plaintiff was ready, and offered to enable them to take up the note. It seems to me, therefore, that substantially this instrument is payable upon a contingency, and is the same as if it had said 'Pay W. C. \$400 on his giving up our note,' etc. Had such been the form it would clearly not be technically a bill of exchange. The holder, in declaring upon it, should aver his readiness to deliver up the note." *Cook v. Satterlee*, 6 *Cow.*, 109. "An instrument, by which an individual, ninety days after the dissolution of the copartnership between C. & P. and the settling of the books of the said firm, promises, in behalf of P., to pay to C. \$550, the interest to be paid annually by P., is not a promissory note; it being payable after the happening of two events, one of which—viz., the settling of the books—may never happen. Such an instrument is an agreement." *Sackett v. Palmer*, 25 *Barb.*, 179. "Note payable 'when all appeals shall have been disposed of and the right to appeal has expired,' in a certain action, is not due while there is a possibility of judgment which might be the subject of an appeal." *Clute v. McCrea*, 12 *N. Y. St. Rep.*, 648. "An accepted order for the payment of money forty days after date, 'on account of contract when completed and satisfactory,' is not a bill of exchange absolutely payable at the end of forty days whether the work is completed or not." *Home Bank v. Drumgool*, 109 *N. Y.*, 63. "A writing in the form of a promissory note was endorsed 'The within to be paid when M. pays the note of \$70 to L. or bearer, dated Dec. 19, 1878.' Held, that the instrument was not a promissory note, but a mere conditional promise." *Stout*

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Appellant's points.

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*v. Liddell*, 20 *Week. Dig.*, 247; *Van Wagner v. Terrett*, 27 *Barb.*, 181; *Seacord v. Burling*, 5 *Den.*, 444; *Austin v. Burns*, 16 *Barb.*, 643; *Costello v. Crowell*, 127 *Mass.*, 293; *Crippen v. Rowley*, 2 *Albany L. J.*, 394; *James v. Hagan*, 1 *Daly*, 517.

II. Before suit could have been maintained by plaintiffs, defendant had the option to pay said note upon one of two conditions arising from the acts of the plaintiffs, to wit: (a.) "Upon the return of or offer to return the security given," etc.; or (b.) "In case of deficiency to pay the said Coffin & Stanton, agents, the amounts thereof forthwith after such sale, with legal interest." Neither of these contingencies had happened, and the burden of causing them to happen rested upon the plaintiff; hence the time for payment had not arrived. Therefore this action was prematurely brought and the judgment should be reversed. "The promissor had the right of election to pay at either time specified." *Sackett v. Palmer*, 25 *Barb.*, 182.

III. The note and the syndicate agreement, exhibit "A" were contemporaneous papers, and must be read and construed together; and the court erred in refusing to allow exhibit "A" to be read in evidence, since, in addition to the testimony, Mr. Norwood admitted that this note was the one referred to in said agreement. "Note and contemporaneous paper must be read together." *Watson v. Blossom*, 18 *N. Y. St. Rep.*, 726; *Benedict v. Cowden*, 49 *N. Y.*, 396; *Dinsmore v. Duncan*, 57 *Ib.*, 573, 579. The syndicate agreement, exhibit "A," which explains and sets forth the note sued on in this action, and which was only made, executed and delivered by virtue of said agreement, was as much a part of it as the agreement itself. There can be no question that this required the trial court to have them both read together. *Rogers v. Smith*, 47 *N. Y.*, 324. "Where two instruments are intended to embody a contract between the parties they must be read and

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construed together." Knowles v. Toone, 96 *N. Y.*, 534; Marsh v. Dodge, 66 *Ib.*, 537. This syndicate agreement being fully set forth in the answer, it would not be considered a proper thing to plead the legal effect of the agreement or the conclusions of law to be derived therefrom, or the legal theory upon which the defendant based its defence. The agreement having been pleaded gave the right to put it in evidence, and then the right to ask the court to give it due effect. Springer v. Dwyer, 50 *N. Y.*, 19; Hemmingway v. Poucher, 98 *Ib.*, 281; Trimble v. Stillwell, 4 *E. D. Smith*, 512. It having been admitted by plaintiffs' counsel and proven by the defendant's witness, Mr. Crow, "that is the note mentioned and referred to in the syndicate agreement marked 'Defendant's Exhibit A, for identification,'" the court was bound to receive said exhibit "A" in evidence as the note and syndicate agreement were part and parcel of the same transaction, and one without the other would be incomplete. It was the duty of the trial court to have permitted the "syndicate agreement" to have been read in evidence, since that was the only way in which the court and jury could have arrived at what the transactions were between the parties. The importance of this "syndicate agreement" will be apparent to this court by reading the following extracts therefrom, to wit: "In the event of the non-purchase of the water-works system of the city of Grand Rapids, Mich., and non-payment of the notes by the Grand Rapids Hydraulic Company or its assigns, then the syndicate shall act as a unit for their mutual interests. It is also agreed that each firm or individual signing this agreement shall take up, pay for and carry their or his proportionate amount of loan made to, and bonds purchased of, said The Grand Rapids Hydraulic Company, as stated herein." To more clearly outline the position of the defendant I now refer your Honors to its answer. I quote from the case; "And that the said note was not

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Appellant's points.

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made otherwise than under the said agreement, and that it was only delivered to the plaintiffs under and pursuant to the terms of said agreement hereinbefore referred to and marked 'exhibit A.' That the plaintiffs are not entitled to maintain this action under the terms of the said agreement 'exhibit A,' hereto annexed, but have brought and are prosecuting this action in violation of the terms of said 'exhibit A' and of the agreement made and signed by all of the plaintiffs on June 11, 1890." These allegations in the answer make an issue which can be explained or understood only when the said "exhibit A" has been read in evidence (which was not permitted by the court below). Your Honors will observe, "that each firm or individual signing this agreement (exhibit A) shall take up, pay for and carry their or his proportionate amount of loan made to, and bonds purchased of," etc. This they did not do, and defendant claims that this action cannot be maintained between the original parties, since it was the plaintiffs' duty, they being members of the syndicate, to "take up, pay for and carry their proportionate amount of said loan," and, therefore, they had no right to sue.

IV. The plaintiffs had no right to sue upon this note, as they were not the principals; they were simply the agents of the syndicate, which consisted of five individuals and firms, and the action should have been in the names of the several members of the syndicate, or as agents of the said syndicate, if they had such authority. And the court in excluding evidence upon this proposition erred.

V. The court erred in refusing to receive exhibit A (syndicate agreement) in evidence after plaintiff's counsel had used it in cross-examination. The court had heretofore refused the defendant the right to use it as evidence; but now the plaintiff having used it, referred to it, and had testimony given from it, as a matter of law we had a right to read it in evidence.

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Appellant's points.

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VI. The court did not properly exercise its discretion when it refused defendant permission to amend its answer at the trial. "MR. BRIGGS: I move for leave to amend the answer, under the ruling of the court, upon such terms as your Honor shall deem proper to impose." Then follows the proposed amendments and a renewal of the offer. It does not seem as if it was an exercise of sound discretion or in furtherance of justice to refuse such amendments as were requested. Certainly defendant's counsel could not suggest or offer anything fairer than he did. He was perfectly willing to accept such terms as the court might impose and on such conditions, no matter what they were. That the court had the power to grant the amendment asked cannot be disputed, and it should have done it. "The court must, upon application, allow a pleading to be amended at any time during the pendency of the action, even on appeal, if substantial justice will be promoted thereby," etc. *Enright v. Seymour*, 8 *N. Y. St. R.*, 356; *Hunter v. Hudson R. I. & M. Co.*, 20 *Barb.*, 493.

VII. This action could not be maintained by the plaintiffs as against the defendant, since they were not the owners of the note, nor were they entitled to the full amount, their interest being only "three-fifths," and it was error for the court to direct a verdict in their favor for the full amount against defendant's objection. It appears from the testimony in this action that Moses R. Crow was the owner of one-fifth interest in this note and in the syndicate agreement, and that he had advanced one-fifth of said loan of \$100,000. D. F. Cameron had signed said syndicate agreement for one-fifth, and had assigned his interest to Moses R. Crow, and the plaintiffs herein recognized Mr. Crow as assignee of such one-fifth. With these facts undisputed how can this judgment stand? By what right or authority can a judgment of \$1,985.40 be directed against us, when all the interest that the plaintiffs had therein was three-

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Opinion of the Court, by MCADAM, J.

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fifths. If they were entitled to anything it would be a judgment for only three-fifths of the sum claimed.

*Norwood & Coggeshall*, attorneys, and *Carlisle Norwood* of counsel, for respondents.

BY THE COURT.—MCADAM, J.—The issues were simple enough, and the complications attempted to be interjected into the case arise from an effort on the part of the defendant to litigate questions not raised by the pleadings nor germane to the controversy before the court. This circumstance requires us to state the issues raised, that the propositions involved may be intelligently understood.

The complaint alleges three causes of action, each based upon a promissory note.

The copartnership of the plaintiffs as bankers in the city of New York, under the firm name of Coffin & Stanton, was alleged and admitted by non-denial. The complaint then alleged that the defendant was and is a foreign corporation, duly incorporated under the laws of the State of Michigan, and that its principal place of business is at Grand Rapids, in that State. These allegations were also admitted by non-denial. Then the complaint alleges, as the first cause of action, that on or about the 15th day of May, 1889, the defendant, at the city of New York, made its certain promissory note in writing, whereby it promised, one year after date, to pay Coffin & Stanton, agents, etc. (the plaintiffs), or order, the sum of thirty thousand dollars, with interest at six per cent. per annum, and that the defendant duly delivered said note to the plaintiffs.

The amended answer expressly admitted "the making of the note described in paragraph fourth of the first cause of action," but alleged as new matter that the same was made and delivered pursuant to an agreement between the plaintiff and defendant April 12, 1889,

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Opinion of the Court, by MCADAM, J.

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known as the "syndicate" agreement, a copy of which is annexed to and made part of the answer.

The amended answer then alleged that the note was not delivered to the plaintiffs other than as copartners or members of a syndicate as mentioned and set forth in said agreement and that the plaintiffs are not entitled to maintain this suit on said note for the reason that the same has been satisfied and paid, and should be delivered up and canceled to the defendant, and that the said note was not made otherwise than under the said agreement and that it was only delivered to the plaintiffs under and pursuant to the terms of said agreement therein before referred to. The complaint contained similar allegations as to the second and third causes of action. The admissions, denials and new matter in the defendant's amended answer relating to the second and third causes of action, are the same as those affecting the first cause of action.

The amended answer then alleges additional matter by way of defence, to the several causes of action, reiterating the defence of payment and satisfaction, and further stating that the plaintiffs by an instrument in writing, bearing date June 11, 1890, known as the "bondholders'" agreement, agreed to surrender and cancel said notes, and were given and allowed full satisfaction and payment therefor pursuant to such agreement, but they had failed, neglected and refused to deliver the notes and had wrongfully brought this action in violation of the terms and conditions of said agreement, a copy of which is also annexed to and made part of the answer.

The amended answer then alleges that the defendant fully carried out and performed all the parts of the "syndicate agreement" binding or obligatory upon the defendant up to the date of the commencement of the action, but that the plaintiffs herein failed to perform and carry out the parts of the agreement binding and obligatory upon them to the damage of the defendant, etc.

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Opinion of the Court, by McADAM, J.

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As an offset and counterclaim, the amended answer further alleges that pursuant to the "syndicate" agreement and the "bondholders'" agreement, the plaintiffs became bound unto and liable to the defendant to account for the funds and property of this defendant in the hands of the plaintiffs to the value of upwards of sixty thousand dollars; that plaintiffs, although the defendant has duly demanded such accounting, have failed and neglected to make the same or cause the same to be made; that on such accounting the plaintiffs should be adjudged and ordered to deliver over to the defendant herein the notes sued in this action and such cash and bonds received by the plaintiffs and withheld from this defendant after demand as may be found or decreed to be in the hands of or withheld by the said plaintiffs from this defendant. These allegations were controverted by the reply.

The amended answer also alleged that by reason of the failure of the plaintiffs to carry out their part of the "syndicate" agreement, the defendant had suffered loss, damage and expense for which the plaintiffs are liable to the defendant under said agreement and under the "bondholders'" agreement. This matter was controverted by the reply.

Judgment was prayed for dismissing the complaint; for an accounting; and for whatever might be found due upon such accounting, and for sixty thousand dollars damages.

The plaintiffs proved the interest on the several notes, and rested their case. The defendant then moved to dismiss the complaint, on the ground that the execution of the notes sued upon was not proved. The court inquired if the defendant did not admit the making of the notes, to which the defendant's counsel replied, that it admitted the notes were made subject to the two agreements mentioned, and the court properly held, that as they were not referred to in the complaint, but were

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Opinion of the Court, by MCADAM, J.

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pleaded in defence, the *onus* of proving the agreements was on the defendant.

The defendant then offered in evidence, the "syndicate" agreement. Its execution was admitted, but it was excluded for the reason that it contained nothing that operated as a bar to the action, and was therefore *immaterial*. The "bondholders'" agreement was next offered in evidence and excluded as irrelevant and immaterial, and as not sufficiently proven. These rulings were proper.

*First. As to syndicate agreement.* The parties thereto are the defendant-company on the one part, and a syndicate, composed of the plaintiffs, together with Stanton D. Loring, of Boston, Mass.; Woodbury & Moulton, of Portland, Me.; Elliott, Johnson & Co., of Wilmington, Del.; and Duncan F. Cameron, of New York; of the second part. The agreement was not merely joint as to the syndicate, but several "for the respective interests or amounts, for which they (the members) severally signed their names." The syndicate agreed to *loan* the defendant one hundred thousand dollars on its notes as specified therein. The notes in this and the two other suits are the notes given on the loan, and aggregate the entire amount thereof. There is no claim that the moneys thereon were not advanced, nor the sums claimed actually due, if the terms of the notes are to control the time of payment. That they were to control (subject to certain contingencies that have not happened) is apparent. The agreement provides that the notes are to run "one year" at six per cent. interest, with two hundred thousand dollars par value of the bonds of the company attached thereto as collateral. The notes were the principal obligation, the bonds merely incidents in the nature of security for their payment.

The defendant had the liberty of substituting as collateral for the notes, a certain new contemplated issue

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Opinion of the Court, by MCADAM J.

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of bonds, and the syndicate was to take such new issue, and pay for the same at ninety cents on the dollar, at or before the maturity of the loan. This portion of the agreement did not become operative, because the new mortgage was not made, nor the new bonds issued, so that this phase of the case need not be pursued. So with other provisions of the contract which require no special reference. They are not in the nature of conditions precedent on the part of the syndicate, for they depended on the prior performance of certain duties by the defendant, which formed the executory consideration for the acts the syndicate was to perform, and the failure of the defendant to execute such prior duties relieved the syndicate from fulfilling the promises which made it dependent on such performance. The law in this regard is settled.

There are covenants which are conditions and dependent, in which the performance of one depends upon the prior performance of another, and until this prior condition is performed, the other party is not liable to an action on his covenant. The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and however transposed they may be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance, *Addison on Cont.*, 2d Am. from the 4th Eng. ed. p. 865. "In all executory contracts," observes HOLT, C. J., "if the agreement be that one shall do an act, and for the doing thereof the other shall pay, the doing of the act is a condition precedent to the payment, and the party who is to pay shall not be compelled to part with his money till the thing be performed for which he is to pay," *Thorpe v. Thorpe*, 1 *Salk.*, 181; and, therefore, if two men should agree, one that the other should have his horse, the other that he will pay him £10 for it, no action lies till the horse be delivered. *Ib.*; *Peters v. Opie*, 2 *Saund.*, 350. Tested

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Opinion of the Court, by McADAM, J.

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by these rules, it is evident that the execution of the new mortgage and issuing of the new bonds by the defendant was to precede any duty or liability on the part of the plaintiffs or the syndicate to do any act concerning them, and as neither was made nor issued, the covenant of the syndicate concerning them never became the subject of default on the part of the plaintiffs or any other member of the combination. See *Dunham v. Pettee*, 8 N. Y., 513.

The plaintiffs were not the disbursing agents of the defendant, but of the syndicate. They were to get in the necessary contributions from members, and pay the moneys over to the defendant, and that they performed this duty is evidenced by the promissory notes, which are the written acknowledgments for the money. The amount paid over by the plaintiffs to the defendant became its property as soon as it entered the treasury of the company, and the duty of disbursing such funds within the restrictions imposed by the agreement devolved upon its officers.

There was no breach of condition or duty by the plaintiffs and no default by them and consequently no reason why they should not be allowed to enforce the obligations owned by them, or why they should be held to have incurred any present liability to the defendant.

No evidence was given in support of the defendant's counter-claim, and no legal basis for its existence appeared in any form.

The defendant lays great stress upon the clause in the "syndicate" agreement, that "In the event of the non-purchase of the water works system of the city of Grand Rapids, Mich., and non-payment of the note by the Grand Rapids Hydraulic Company, or its assigns, then the syndicate shall act as a unit for their mutual interests."

The purchase was not made, and the defendant urges that the loans could be enforced by the syndicate only

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Opinion of the Court, by McADAM, J.

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after all the members thereof had voted to enforce them, and that there was a want of unanimity, because Moses R. Crow, who succeeded to the interest of Duncan F. Cameron, in the syndicate, opposed the enforcement thereof. Crow was the president of the defendant company, and his interests like those of the corporation he represented, were antagonistic to the syndicate. It is but reasonable to hold that the provision requiring the members to act as a unit in certain contingencies does not mean that one member of it may transfer his interest to a hostile party, and thus prevent unanimous action. To decide otherwise would be to permit the president of the defendant company to postpone the payment of the notes in suit until such time as he (Crow) saw fit to permit their enforcement.

The unity of interest for concerted action was destroyed when Cameron, who was disinterested, went out, and Crow, who was interested and hostile, came in. The other members of the syndicate could not be expected to consult him as to their interests, when they knew in advance that his advice and judgment were biased by interests hostile to their own. The compact as to mutual advice and united action, was by the withdrawal of Cameron abrogated or changed to such an extent, at least, that Crow, representing the adverse interest, could neither dictate nor control the action of the other members of the syndicate.

The trial judge properly held that the "syndicate" agreement was not a bar to the action, that unanimity of purpose was no longer necessary, and though perhaps in a sense relevant to the issues, the agreement was immaterial as matter of defence, and refusing to admit it in evidence in no manner prejudiced the defendant.

*Next, as to the "bondholders' " agreement.* This was offered in evidence by the defendant and excluded. It was not executed by the defendant, was not sufficiently proved to have been executed by all who purported to

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have subscribed it, and by its terms, it was not to become binding until it was signed by all the bondholders, and until all the bonds and past-due coupons were delivered and deposited as therein provided, and there was no proof or offer to prove that these pre-requisites to a binding contract had been complied with. The evidence (both documentary and oral) excluded by the trial judge would not have altered the result if it had been admitted. No error was committed in its exclusion. The defendant was technical at the trial, in regard to the plaintiffs' proofs and their right to maintain the action, and the plaintiffs in turn were equally fastidious about the defendant's mode of pleading, and insisted upon the rule that a defendant cannot avail himself at the trial of a defence consisting of new matter not pleaded, *Code*, § 500, subd. 2, and claimed, that the allegations in defendant's amended answer, that plaintiffs "have wrongfully brought this action in violation of their written agreement and in violation of the spirit, terms and conditions of the said other agreement hereinbefore mentioned," etc., and the further allegation "that the defendant fully carried out and performed all the portions and parts of the agreement thereto annexed, binding or obligatory upon the defendant, up to the date of the commencement of this action, but that plaintiffs herein failed to perform and carry out the parts and portions of the said agreement, binding and obligatory upon them to the damage of this defendant"; all were conclusions of law; no facts having been pleaded tending to show a breach of the agreement by the plaintiffs. *Les Suc. D'Arles v. Freedman*, 53 *N. Y. Super.*, 518; *Knapp v. City of Brooklyn*, 97 *N. Y.*, 520, 523; *Van Schaick v. Winne*, 16 *Barb.*, 89; *Butler v. Viele*, 44 *Ib.*, 166, 169; *Chauviant v. Maillard*, 4 *N. Y. Supp.*, 126; *Jennings v. Grand Trunk Railway Co.*, 52 *Hun*, 227, at pp. 232, 233, *Aff'd* 127 *N. Y.*, 438.

The defendant's amended answer is open to the criti-

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Opinion of the Court, by McADAM, J.

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cism made, and to the objection sustained by the cases cited. The defendant now insists that the obligations sued upon were not promissory notes, but conditional agreements for the payment of money. The complaint declared upon them as promissory notes, and the amended answer did not dispute the allegations in that regard. The admission concluded the defendant. *Code*, § 522. The obligations were offered in evidence by the defendant, but no point was made that the securities should have been tendered before suit brought. That objection might have been obviated then and cannot be urged for the first time upon appeal. *Devoe v. Brandt*, 58 *Barb.*, 493; *Newton v. Harris*, 6 *N. Y.*, 345; *Binsse v. Wood*, 37 *Ib.*, 526; *Jencks v. Smith*, 1 *Ib.*, 90; *Lewis v. Ryder*, 13 *Abb.*, 1; *Ferguson v. U. S. L. & I. Co.*, 33 *State R.*, 425. But, aside from this, the defendant on paying the judgment will be entitled as of right to the collaterals given to secure the debt, and in no event would the defendant have been entitled to the securities until it tendered payment of the debt.

The plea of payment and satisfaction set up in the answer was unproved, and apart from the complications and technicalities imported into the case by the defendant, there does not seem to have been a shadow of defence established. The objection that the plaintiffs could not maintain the action is untenable. The obligations sued upon according to the complaint (and not denied by the answer), were absolute promises to pay to "Coffin & Stanton, agents, etc." (the plaintiffs), at times stated, specific sums of money, and according to the instruments themselves, they were promises to pay to them, in manner aforesaid, upon the return of the securities deposited as collateral. See *Oatman v. Taylor*, 29 *N. Y.*, 649. If the action was not maintainable by the plaintiffs, as the real parties in interest, it was certainly maintainable by them as trustees of an express trust, for the contracts were made in their name. *Code*, § 449;

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Opinion of the Court, by McADAM, J.

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Considerant v. Brisbane, 22 *N. Y.*, 389; Slocum v. Barry, 34 *How.*, 320; Hutchins v. Smith, 46 *Barb.*, 235.

If the defendant intended to raise the objection that the plaintiffs were not the real parties in interest, it should have been pleaded in defence. *Savage v. Corn E. F. Ins. Co.*, 4 *Bosw.*, 15, 16; *Hammond v. Earle*, 58 *How.*, 438; *White v. Drake*, 3 *Abb. N. C.*, 134. A number of the rulings excluding testimony are sustained by the disposition we have made of the "syndicate" and "bondholders'" agreements, some because facts were not pleaded, making the proof competent, others because the questions attempted to prove facts which according to the legal rights of the parties under the obligations sued upon and the agreements aforesaid, as we have interpreted them, were immaterial. It is not necessary to review these rulings in detail, as it would lead to useless repetition.

The defendant, appreciating the defective condition of the amended answer for the purpose of raising the questions it undertook to litigate, moved to amend it, but the trial judge in the exercise of judicial discretion refused to allow the amendment proposed. The discretion was not abused, and, therefore, the ruling cannot be assigned as ground of reversible error. We have examined the record with the aid of the elaborate briefs of counsel, and find no error that requires a new trial.

There was no real, substantial or meritorious defence to the action, and the verdict directed merely gives effect to the legal rights and obligations of the parties. It follows that the judgment entered on the verdict and the order denying the motion for a new trial, must be affirmed, with costs.

SEDGWICK, Ch. J., concurred.

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Appellant's points.

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ANDREW W. SCHELLING, APPELLANT v. CORD  
BISCHOFF, ET AL., RESPONDENTS.

*Bill of sale, action to set the same aside on the ground of fraud.*

There were no material misrepresentations made by defendants to induce the plaintiff to execute the bill of sale in this case. Plaintiff intended to give defendants security for their demands against him, and it was executed in the form of a bill of sale, when a chattel mortgage might have been more appropriate for the purpose intended. After the defendants received the bill of sale, they asserted their rights under it, sooner than the plaintiff expected, and plaintiff's store and stock in trade, etc., were sold to satisfy defendants' claims. This action was to set aside the bill of sale on the ground of fraud.

*Held*, that the bill of sale was not procured by fraudulent representations as to material facts, and should not be set aside, and, therefore, the complaint was properly dismissed. Although the bill of sale was absolute on its face, it was clearly intended as security for the debt by way of mortgage and not as a satisfaction thereof, and if this action had been to declare it as a mere security for the sum due and for an accounting of the proceeds of sale, it would have been maintained; but this action is founded on fraud to avoid the instrument altogether and for damages, as if no writing whatever had been executed or intended to be executed. The plaintiff is not entitled on the evidence in the case to the broad relief claimed.

Before FREEDMAN and McADAM, JJ.

*Decided May 2, 1892.*

Appeal by the plaintiff from a judgment entered upon dismissal of his complaint by direction of the judge presiding at the equity term after a trial thereat.

*James Forrest*, for appellant, on the question considered, argued:—

I. Intent or intention is an emotion or operation of

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Appellant's points.

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the mind, and can usually be shown only by acts or declarations ("as in this case the defendants represented to the plaintiff that they only wanted security, and that his business would not be disturbed"); and, as acts speak louder than words, if a party does an act which defrauds another, his declaring that he did not by the act intend to defraud is weighed down by the evidence of his own act. *Babcock v. Eckler*, 24 *N. Y.*, 632; *Newman v. Cordell*, 43 *Barb.*, 456. Fraud does not consist in mere intention, but in intention acted out, or made effectual by hurtful acts; in conduct that operates prejudicially upon the rights of others, and which was so intended. It is sometimes said to consist of "any kind of artifice employed by one person to deceive another." *Billings v. Billings*, 31 *Hun*, 65-69. The act of the defendants in obtaining the plaintiff's property by false and fraudulent representations, valued by him at \$3,000, to pay their debt of \$700, was fraudulent in itself and shows an inference of fraudulent intent. An act innocent in the intention may be so injurious in the consequences that the law declares it to be a fraud and forbids it. *Kisterbock's Appeal*, 51 *Pa. St.*, 485; *Lawson v. Funk*, 108 *Ill.*, 507. The court has gone so far as to hold that where there was no finding of a fraudulent intent, but, on the contrary, the finding that the whole transaction to be fair and honest, and, therefore, the transaction should stand. The court say, however, that the referee has found facts from which the inference of fraud is inevitable, and, although he has characterized the transactions as honest and fair, that does not make them innocent, nor change their essential character in the eye of the law. *Coleman v. Burr*, 93 *N. Y.*, 31. The defendants in that case, as in this case, must be deemed to have intended the natural and inevitable consequences of their acts, and that was to cheat and defraud the plaintiff out of his property. *Cunningham v. Freeborn*, 11 *Wend.*, 241; *Edgell v. Hart*, 9

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Appellant's points.

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*N. Y.*, 213; *Ford v. Williams*, 24 *Ib.*, 359; *Babcock v. Eckler*, 24 *Ib.*, 623, 632. Equity endeavors to deal with the substance of affairs; to look beyond the observance of mere forms; to regulate its judgment according to the real purposes which controlled parties in the various matters brought before it for relief or correction. The Supreme Court of Illinois say: "Equity will penetrate beyond the covering of form, and look at the substance of a transaction, and treat it as it really and in essence is, however it may seem." *Wadhams v. Gay*, 73 *Ill.*, 415, 435; *Gay v. Parpart*, 106 *U. S.*, 699; *Fowler's Appeal*, 87 *Pa. St.*, 454; *Wright v. Oroville M. Co.*, 40 *Cal.*, 20; *Livermore v. McNair*, 34 *N. J. Eq.*, 482; *Buck v. Voreis*, 89 *Ind.*, 117. In *Buck v. Voreis*, Judge ELLIOTT said: "Forms are of little moment; for where fraud appears courts will drive through all matters of form and expose and punish the corrupt act." Rules of pleading in equity are not so strict in matters of form as at law. *Warner v. Blakeman*, 4 *Keyes*, 507.

II. If the defendants represented as true that which they know to be false, and make the representations in such a way, or under such circumstances, as to induce the plaintiff in this case (or a reasonable man) to believe it is true, and the person to whom the representation has been made, believing it to be true, acts upon the faith of it, and by so acting sustains damage, there is fraud to support an action, and also ground for the rescission of the transaction in equity. There is a fraudulent intent if a man, either with the view of benefiting himself or misleading another into a course of action which may be injurious to him, makes a representation which he knows to be false. *Taylor v. Ashworth*, 11 *M. & W.*, 413; *Evans v. Edmonds*, 13 *C. B.*, 786; *Thorn v. Bigland*, 8 *Exch.*, 725. A court of equity will always interfere to grant relief when settlements, contracts, agreements and even judgments have been ob-

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Respondents' points.

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tained by means of fraud, misrepresentations and deceit. *State of Michigan v. P. Bank*, 33 *N. Y.*, 25 ; *Dobson v. Pearce*, 12 *Ib.*, 156 ; *People v. Eddy*, 57 *Barb.*, 594, 603 ; *Baker v. Spencer*, 47 *N. Y.*, 562 ; *Brown v. Post*, 1 *Hun*, 303 ; *Ross v. Ross*, 6 *Ib.*, 83 ; *Hardt v. Schulting*, 85 *N. Y.*, 625 ; *I. & T. Bank v. Everett*, 21 *N. Y. St. R.*, 98, 102. Actionable fraud consisting in a false representation imports, *ex vi termini*, an intent to deceive. It may be committed by stating what is known to be false. It may be committed by professing knowledge of the truth of a statement which is untrue. But in either case falsehood uttered with intent to deceive are the essential ingredients. *Chester v. Comstock*, 40 *N. Y.*, 575.

*Uriah W. Tompkins*, for respondents, on the questions considered, argued:—

I. Was any fraud shown? Our answer, as well as the answer of the court in dismissing the complaint is, No. What are the facts? On January 3, 1890, the plaintiff says that he owed the defendants \$750; did not know that it was \$853.90. The defendants wanted security for the payment of the amount owed. Plaintiff says: "I was told the paper (the bill of sale) was security for the amount I owed to the defendants." He signed it at the office of the defendants; signed it in the morning and left it with Mr. Alexander. It will be seen from the above statement that the consideration for the bill of sale to the defendants was a substantial indebtedness of the plaintiff to them, and they had a right to secure payment of that indebtedness by all lawful means. That was accomplished by the plaintiff giving the bill of sale he now seeks to set aside. Fraud must be proved, it must not be left for inference or conjecture. *Stowe v. Stacy*, 9 *N. Y. Supp.*, 2 ; *Ladew v. Hudson R. B. S. & Mfg. Co.*, 15 *Ib.*, 901. Careful scrutiny of the testimony will not disclose any fraudu-

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Opinion of the Court, by McADAM, J.

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lent representations on the part of the defendants for the purpose of securing plaintiff's indebtedness to them.

II. The testimony of plaintiff as to alleged fraudulent statements has reference only to securing the judgment. The judgment having been canceled before the commencement of this action, and no property having been taken under the execution issued thereon, no damages could be recovered nor equitable relief granted in this action on the ground of fraudulent obtaining of the judgment, even assuming that its procurement was fraudulent.

III. If the contention of the plaintiff be that there was a fraudulent use of the bill of sale, then the answer is that there is no allegation in the complaint equivalent to an affirmance that at the time defendants obtained the bill of sale they intended to defraud the plaintiff.

BY THE COURT.—McADAM, J.—The evidence shows that there was no material misrepresentations made to induce the plaintiff to execute the bill of sale. He intended to give the defendants, who were creditors of his, security for their demand against him, and it was put in the form of a bill of sale, when a chattel mortgage might have been more appropriate for the purpose intended. After the defendants received the bill of sale, they asserted their rights under it, sooner than the plaintiff expected, and as a consequence his store, stock in trade, etc., were sold to satisfy their claim. The action is to set aside the bill of sale, and a confession of judgment thereafter obtained on the ground of fraud. The defendants removed their judgment from the records by satisfaction piece duly filed, and the acts done by them are justified solely under the bill of sale. Nothing was taken under the judgment, and as it was canceled of record, before the commencement of this action, the plaintiff required no equitable relief to be discharged

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Opinion of the Court, by MCADAM, J.

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from it. The bill of sale not having been procured by fraudulent representations as to material facts, the complaint was properly dismissed, not so much for the absence of allegations of fraudulent intent, as from the want of evidence of fraud in procuring the execution of the instrument. Though absolute on its face, the bill of sale was clearly intended, not as a satisfaction of the debt, but by way of mortgage only, and if the action had been to declare it a mere security for the sum due, and for an accounting of the proceeds of sale it would have been maintainable. Equity, it is true, will, in a proper case, penetrate beyond the covering of form, and look at the substance of the transaction, and treat it as it really and in essence is, and was intended to be and as it should have been declared in the papers, for, a writing, like the phonograph, should record the true expressions and intentions of the parties as they made and proclaimed them. Where it does not, reformation is the remedy. There may be trouble in furnishing satisfactory proof of fraud or mutual mistake—none with the remedy if the required proof is sufficient. The difficulty here is, that if the bill of sale had been a chattel mortgage, the defendants might have done the same acts under it as were performed under the bill of sale, that is taking possession and selling the property to the highest bidder. The mortgagee would have been liable, however, to a suit in equity calling them to account for the proceeds of sale. *Jones on Chatt. Mort's*, § 353. The present suit is not for reformation and account, but is founded on fraud to avoid the instrument altogether, and for damages as if no writing whatever had been executed or intended to be executed. The plaintiff is not entitled to that broad relief on the evidence. As the instrument executed, and that intended to have been given, concerned personal property, and would in either event have produced the same result, the variance of form is in the present instance of no practical impor-

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Statement of the Case.

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tance. It follows that the judgment appealed from must be affirmed, with costs.

FREEDMAN, J., concurred.

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LEROY M. LYON, PLAINTIFF v. HALSEY FITCH,  
IMPLEADED, ETC., DEFENDANTS.

*Promissory note—Bona fide holder—Partnership ; each partner can bind firm within the scope of its business only.*

The defendant Whitney made the \$4,000 note in suit, May 1, 1889, payable to his own order, thirteen months from its date, and indorsed the note, first by his individual name and next by that of Fitch & Whitney, a firm of which he was a member, and delivered the same to one Hills in consideration of moneys loaned by Hills to Whitney long before the firm of Fitch & Whitney was formed. The plaintiff received the note from Hills before maturity and gave him (Hills) credit for the amount of the same on an account due to plaintiff from Hills.

*Held*, that the plaintiff having parted with nothing on the faith of the paper, he did not become a *bona fide* holder thereof for value under the rules established in this state. The plaintiff simply succeeded to the rights of Hills, subject to all the equities existing between him and the defendants. Hills could not have maintained an action on this note against Fitch, because he knew the note and its endorsement had no connection nor business relation whatever with the firm of Fitch & Whitney, or its firm business. It was exclusively and absolutely the private transaction and personal contract of Whitney, and the plaintiff stands in no better position than Hills stood. Each partner is the agent of the partnership in, and as to all matters within the scope of the partnership business, and can bind the firm by making, endorsing and accepting bills and notes in relation to such business ; but a partner has no more authority than a mere stranger to execute such paper in his individual business or for the accommodation of others ; but as every partner has *prima facie* equal power to execute paper, a note signed by the firm name, although made by a single partner, is presumably a firm note ; but when it appears, as in this case, that the note was not indorsed in the course of partnership business, but for the benefit of Whitney, and this fact was known to Hills, then it was incumbent on Hills' transferee to show that Fitch as well as Whitney assented to the endorsement, that Fitch was a party to

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Plaintiff's points.

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the contract. His assent must be proved and will not be implied or presumed.' The exception to this rule exists only in favor of a *bona fide* holder for value without notice, for the giving of a note in partnership name by a partner, is a virtual representation that it is given in the partnership business and, if negotiable, this representation is deemed in law to have been made to every *bona fide* holder of the note, and the firm is estopped from denying the authority of the partner to execute and issue the instrument. The admissions made by one of a number of persons sought to be charged as partners, cannot be used against the others. Nothing short of the separate admissions of each is competent to establish a partnership between them.

Before FREEDMAN and McADAM, JJ.

*Decided May 2, 1892.*

The trial judge dismissed the plaintiff's complaint, and directed that the exceptions be heard in the first instance at general term. The plaintiff moves for a new trial on the exceptions taken.

*Edward S. Clinch*, for plaintiff, argued :—

I. The answer of the defendant Fitch is clearly frivolous. The complaint alleges that the defendant Whitney made a promissory note; that the firm of Fitch & Whitney, composed of the defendants Whitney and Fitch, for a valuable consideration, endorsed the note and delivered it to William Hills; that he, for a valuable consideration, endorsed and delivered it to the plaintiff, and that, when the note became due and payable, it was presented for payment and payment thereof demanded and refused, and that of this demand and refusal of defendants had due notice, and that no part of the note has been paid. Among the things denied upon information and belief by the answer of the defendant Fitch is the allegation of the existence of the firm of Fitch & Whitney. Fitch certainly knew, when he verified his answer, whether he was a member of that firm, and whether the firm had any existence.

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Plaintiff's points.

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If he did not know whether the firm endorsed the note for a valuable consideration, it was his duty to set out special facts showing why he did not know it. *Thorn v. N. Y. Central Mills*, 10 *How.*, 20; *Chapman v. Palmer*, 12 *Ib.*, 38; *Warner v. U. S. Land Co.*, 53 *Hun*, 312; *Richardson v. Wilton*, 4 *Sandf.*, 708. The answer is clearly frivolous. Cases cited above, and also *Fallon v. Durant*, 60 *How.* 178; *Sherman v. Boehm*, 15 *Abb. N. C.*, 258; *Edwards v. Lent*, 8 *How.*, 28; *Mott v. Burnett*, 2 *E. D. Smith*, 50; *Lewis v. Acker*, 11 *How.*, 163; *Hance v. Rumming*, 2 *E. D. Smith*, 48; *Sherman v. N. Y. Central Mills*, 1 *Abb.*, 187.

II. On the trial, the plaintiff sought to prove, by declarations of the defendant Whitney, that the signature of the maker of the note was Whitney's signature, and that the endorsement of Fitch & Whitney was the firm's signature. Objection was made to the witness testifying to the conversation between him and Whitney, on the ground that the proposed evidence was not the best evidence of the execution of the note by Whitney. At the time the objection was made, it was conceded that Whitney was the maker, and that Fitch and Whitney were partners. The court sustained the objection. This was clearly error. The evidence was certainly competent to prove, by Whitney's admission, that he made the note. It was better evidence than proof of the handwriting of Whitney, which would have been sufficient to prove the signature. The declaration by Whitney, that the signature was his, and his admission of liability upon the note, as maker, were certainly competent evidence against him. And his admissions, as the admissions of any partner with respect to a partnership transaction, are evidence against the firm, though not necessarily conclusive. *Lindley on Partnerships*, 128.

III. The sustaining by the court of the objection, made by Fitch's counsel, to any admissions made by the

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Plaintiff's points.

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defendant Whitney, compelled the plaintiff to call the defendant Whitney as a witness, and thus to assume the responsibility for his evidence, and the burden of proof. The plaintiff could have made out a *prima facie* case, by producing and introducing the note in evidence, and by proving the declarations of the defendant Whitney, that the note was made by him, that the signature of Fitch & Whitney was made by him, and that he was a member of the firm of Fitch & Whitney. *Collins v. Gilbert*, 94 *U. S.*, 753. The burden of proof would then have been upon the defendant Fitch. The shifting of the burden of proof upon the plaintiff was an error, substantial in its character, and justifying a sustaining of the exception of the plaintiff to the ruling of the court, which excluded the declarations of the defendant Whitney. *National State Bank v. Richardson*, 20 *N. Y. State Rep.*, 52; *Nickerson v. Ruger*, 76 *N. Y.*, 279.

IV. It was competent for the plaintiff to show that the special partner, Pitcher, was consulted by the defendant Whitney, before the firm name was endorsed upon the note. By the act under which limited copartnerships are formed the special partner is given special authority to advise as to the management of the partnership concerns. 3 *Rev. Stat.*, 7th ed., p. 2237, § 17. It was proper for him to consult the special partner, Pitcher, and to be guided by his advice, and if Pitcher did advise the endorsement, and thereupon it was given, the case is relieved of any suspicion that the endorsement was made secretly, or under circumstances which would call in question the honesty of the transaction. It is not necessary for each partner to assent to the issue of every note of the firm. Each partner has the implied authority to make or endorse commercial paper. *Tiedemann on Com. Paper*, § 95.

V. It is also competent for the plaintiff to show that

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Defendant's points.

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William Hills surrendered the note which was due on May 1, 1889, and took the note in suit in reliance upon the endorsement of Fitch & Whitney, and that he would not have extended the time for the payment of the note which then fell due, had not a note been given with the endorsement of the firm, or some other endorsement equally good. The exceptions of plaintiff to the exclusion of testimony to this effect are well taken.

VI. The plaintiff showed that, before its maturity, the note in suit was sold by William Hills to the plaintiff for \$4,000, and that this amount was charged by William Hills to the plaintiff in an open account between them, which had existed for a number of years, and upon which the plaintiff was indebted, at the time of the trial, to William Hills, for a settlement of which account Mr. Hills could have called upon Mr. Lyon at any time. This transaction constituted a valid consideration for the note, and made the plaintiff the *bona fide* holder for value, and prevented the defeat of the recovery on the note on the ground of want of consideration. *Tiedemann on Commercial Paper*, § 163, *Metropolitan Bank v. Loyd*, 90 *N. Y.*, 530, 2 *Am. & Eng. Cycl. Law*, page 369; *Nat. Union Bank v. Landon*, 66 *Barb.*, 189.

*Harriman & Fessenden*, for defendant Fitch, argued :

I. The plaintiff had not parted with value for the note and was subject to any defences to which Hills was subject. " Mere discount and credit do not of themselves constitute a *bona fide* purchaser for value. To occupy that position a holder must actually have parted with something of value for the note." *Daniel Negotiable Instruments*, § 779 b. Giving of credit by entering the amount in the books of a bank and not actually parting with a dollar on the strength of the endorsement, cannot be considered parting with value in the sense which the law contemplates. Central National

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Defendant's points.

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Bank v. Valentine, 18 *Hun*, 417; McBride v. Farmers' Bank, 26 *N. Y.*, 450; Note to Clark v. Ely, 2 *Sandf. Ch.*, 166. One who has given his note for a note is not *bona fide* holder for value, to keep out defects, if, at the time, his own note is in the hands of the seller of the original note. Carver v. Cornell, 75 *N. Y.*, 91; Turner v. Treadway, 53 *Ib.*, 650. The plaintiff in this action had parted with no value and cannot be considered a *bona fide* holder for value. The evidence showed that he took the note endorsed without recourse from his special partner. It does not appear to have been a transaction connected with his business, for the transaction had no effect on his business. In fact the only thing effected by the transfer was a change in the ownership of the note. No money passed to Hills; no security was given. Only Lyon became Hills' debtor by oral understanding between the men. Lyon has not parted as yet with a dollar, neither has he placed himself under a binding obligation to Hills or to anybody. Hills cannot compel Lyon to pay for the consideration if Lyon's promise had failed. The note which formed the consideration of Lyon's promise has been discovered to be valueless in a substantial particular, to wit, the endorsement of Fitch & Whitney. Hills in selling the note to Lyon, while he does not guarantee its collection, he does guarantee by implication that the endorsements are genuine and valid. It being shown that the endorsement of Fitch & Whitney is not the act of the firm, Lyon can tender the note to Hills and legally resist any effort of Hills to make him do more. Therefore Lyon has not parted with value.

II. The endorsement, Fitch & Whitney, was without consideration; it was not the act of copartnership; it was void and it was not binding upon Fitch. The authority of one partner to bind his firm springs from the mutual agency of the partners to act for each other in matters pertaining to the business for which they are

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Defendant's points.

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associated, and a person contemplating a partnership with another cannot bind him by a contract for the proposed partnership benefit without special authority. The partnership having been formed, however, the copartner can bind his associates only in such transactions as pertain to the partnership business and the copartnership business must be of such a character that the giving of negotiable paper would be the convenient and proper mode of conducting it in order to create a presumption of agency in a copartner to give a bill or note in the firm name. Persons taking the negotiable paper of a partnership from one partner may presume that he represents his associates, provided that it is in the course of a transaction usually or ordinarily incidental to the business. This paper in suit was taken by Hills with full knowledge of the business of Fitch & Whitney and its incidents, in payment of Whitney's private debt to Hills, contracted prior to the copartnership association. It is testified, however, that there was another object accomplished by giving the firm endorsement and plaintiff looks to it to sustain the note against a partner ignorant of the note's existence, that was, to relieve Whitney of using his interests in the firm to pay his own debts and give the firm the continued use of the money. This was not a purpose for which Hills could presume Whitney to be authorized by his general copartnership powers, nor an act sufficiently germane to the purposes of the partnership business to entitle Whitney to bind his partner without his express assent. A partner can bind his firm only in matters which, according to the *usual* course of dealing, have reference to the business transacted by the firm, and if a person deals with a partner in a matter not within the scope of their business, the intendment of law is that he deals with him on his private account. And this is so even where the copartnership name be used. *Edwards Bill and Notes*, 97 (2d ed.). Where one partner has

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Opinion of the Court, by MCADAM, J.

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a transaction with a third person which is neither apparently nor really within the scope of the partnership business, the partnership is not bound by his declaration or acts in the transaction. He cannot by his declaration make that a partnership transaction which really is not, and which is an individual transaction. In such a case the third person has notice that the transaction is outside of the partnership business and he cannot rely on the partnership credit. *Union Bank v. Underhill*, 102 *N. Y.*, 340. Where the creditor of one partner receives for his debt an obligation of the firm, the law presumes that it is given and received in fraud, and no demand on the partnership is raised. A firm obligation given for the individual indebtedness of one partner without the express consent of the other partner is, in the hands of one who knew what it was given for, void. *Farmers', etc., Bank v. Butchers', etc., Bank*, 16 *N. Y.*, 125.

BY THE COURT.—MCADAM, J.—The action is on a \$4,000 note made May 1, 1889, by the defendant Whitney to his own order, payable thirteen months after date. Whitney endorsed upon the note first his individual name, and next that of Fitch & Whitney, a firm of which he was a member, and delivered the note to one Hills, who thereafter transferred it to the plaintiff. The original consideration for the note was moneys loaned by Hills to Whitney, individually, long before the firm of Fitch & Whitney was formed. The plaintiff received the note from Hills before maturity and gave him credit on account for the amount of it. The plaintiff parted with nothing on the faith of the paper, so that he did not become a *bona fide* holder thereof for value, within the rule as established in this state. *Coddington v. Bay*, 20 *Johns.*, 637; *Stalker v. McDonald*, 6 *Hill*, 93; *Farrington v. Frankfort Bk.*, 24 *Barb.*, 555; *Moore v. Ryder*, 65 *N. Y.*, 438, and other cases collated in 4 *Lawson's Rights and Remedies*, § 1581.

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Opinion of the Court, by MCADAM, J.

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He simply succeeded to the rights of Hills, subject to all the equities existing between him and the defendant. Hills could have maintained no action against Fitch, for he knew the note and the endorsement had nothing whatever to do with the firm business of Fitch & Whitney, and the plaintiff stands in no better position.

Each partner is the agent of the partnership, as to all matters within the scope of the partnership business, and can bind the firm by making, endorsing and accepting bills and notes in such business; but he has no more authority than a mere stranger to execute such paper in his own individual business, or for the accommodation of others, *Farmers' & M. Bk. v. Butchers' & D. Bk.*, 16 *N. Y.*, 135; such note can be enforced only against the partner making it, and the fact that the proceeds may have been used for firm purposes, does not render the non-assenting partner liable on the note. *Union Bk. v. Underhill*, 21 *Hun*, 178. Hills knew that the endorsement of Fitch & Whitney was not given for a partnership debt, or in the partnership business, but was written by Whitney, one of the firm, in a matter not relating to the firm's business, but to a private transaction of his own, and it did not bind Fitch, his co-partner. *Fielden v. Lahens*, 9 *Bosw.*, 445; *S. C.*, 2 *Abb. Ct. App. Dec.*, 111; 6 *Abb. N. S.*, 341; *St. Nicholas Nat. Bk. v. Savery*, 45 *N. Y. Superior Ct. R.*, 97.

Since every partner has *prima facie* equal power, a note signed by the firm name, though made by a single partner, is presumably a firm note, *Whitaker v. Brown*, 16 *Wend.*, 507, and so with a firm endorsement. *Morehead v. Gilmore*, 77 *Pa. St.*, 118. But when it appeared, as it did here, that the note was not endorsed in the course of the partnership business, but for the benefit of Whitney, and that this fact was known to Hills, it was then incumbent on his transferee to show that Fitch as well as Whitney had assented to the undertaking. It was his duty on that state of facts to show

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Opinion of the Court, by MCADAM, J.

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affirmatively that Fitch was a party to the contract. *Wilson v. Williams*, 14 *Wend.*, 147; *Vallett v. Parker*, 6 *Ib.*, 615; *Austin v. Vandermark*, 4 *Hill*, 259. His assent must be proved and will not be implied or presumed. *Mercein v. Andrus*, 10 *Wend.*, 461.

The exception to the rule exists only in favor of a *bona fide* holder for value without notice, *First Natl. Bk. of Chittenango v. Morgan*, 73 *N. Y.*, 593; *Johnson v. Lee*, 30 *State R.*, 389; for the giving of a note in the partnership name is a virtual representation that it is given in the partnership business, and if negotiable, this representation is deemed in law to have been made to every *bona fide* holder of the note, and the firm as to him is estopped from denying the authority of the partner to issue the instrument. *Farmers' & M. Bk. v. Butchers' & D. Bk.*, 16 *N. Y.*, 135; *Griswold v. Haven*, 25 *Ib.*, 602. Another exception is to be found in *Steuben Co. Bk. v. Alberger*, 101 *N. Y.*, 202, where a member of a firm, who had charge of its financial business, took up firm notes by giving in exchange thereof notes of a third person, endorsed by him in the firm name, which endorsement was without the knowledge of the partner, and the court held that the endorsement was within the authority of the partner making it; and that the firm was liable thereon. This upon the ground that the notes sued upon were actually used to retire obligations of the firm, and no limitation was placed upon the power of the financial partner to provide funds for such a purpose.

There was no merit in the plaintiff's case, and his complaint was properly dismissed. The exceptions taken are without force. The questions put for the purpose of proving a partnership by the admissions of Whitney, one of the partners, were properly excluded, for the admissions made by one of a number of persons sought to be charged as partners cannot be used against the others. *Drennan v. House*, 41 *Pa. St.*, 30; *Currie*

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Opinion of the Court, by MCADAM, J.

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*v. Silloyay*, 1 *Allen*, 19. Nothing short of the separate admissions of each is competent to establish a partnership between them. *Field v. Tenney*, 47 *N. H.*, 510; *Bry v. Watson*, 16 *Me.*, 261; *Pleasants v. Faut*, 22 *Wall.*, 116; *McPherson v. Rathbone*, 7 *Wend.*, 216; *Robins v. Warde*, 111 *Mass.*, 244; *Dowley v. Hall*, 5 *Bush.*, 549. The effort to prove that Hills relied on the firm endorsement was abortive, for he knew it did not relate to a partnership transaction. The questions put to Whitney, as to whether the giving of the note was of any benefit to the firm were also properly excluded. They were not calculated to prove a fact, but to elicit the opinion of the witness founded on the theory that if he had paid his own debt from the assets of the firm, it would have depleted its capital to that extent, and hence the firm was benefited by adopting the course he pursued. The evidence rejected would not have affected the result, and the rule is that a new trial will not be granted where the plaintiff has been non-suited, although there was some evidence to establish the case, if the court is satisfied that the evidence, as well that adduced as that offered and rejected, was not sufficient to warrant a verdict in favor of the plaintiff. *Wilson v. Williams*, 14 *Wend.*, 147. It follows that the exceptions must be overruled, the motion for a new trial denied, and the defendant permitted to enter judgment on the non-suit, with costs.

FREEDMAN, J., concurred.

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Statement of the Case.

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LEOPOLD ADLER, RESPONDENT v. THE METROPOLITAN ELEVATED RAILWAY COMPANY,  
ET AL., APPELLANTS.

*Absolute injunction requiring defendants to take down portion of elevated railway station projecting into side street—Strict construction of statutes authorizing elevated railway structure in certain streets—When projection of two feet beyond house line into side street not too trifling to justify injunctive relief.*

In an action to secure relief by way of injunction and incidental rental damages against the defendants' elevated railway in First avenue in the city of New York, it was shown that plaintiff was the owner of premises situated on the southeast corner of First avenue and Eighth street; that the station and platform of the defendants' elevated railway at First avenue and Eighth street was immediately in front of said premises, and that said station and the columns supporting it projected about two feet beyond the easterly house line of First avenue into Eighth street. The trial court directed the entry of a judgment enjoining the further maintenance and operation of defendants' railway and station in front of said premises, awarding a certain sum as damages for past trespasses and providing that the injunction should not be operative as to the structure and portion of the station in First avenue in case defendants, within a time specified, paid to plaintiff the sum of \$5,000, adjudged to be the value of easements taken, but directing defendants within a certain time to take down and remove such portion of said station as projected into Eighth street beyond the easterly house line of First avenue.

*Held*, that the defendants can exercise only such power as the Legislature has given them; that when the route is designated the defendants must keep the whole and every part of their structure, of whatsoever nature the same may be, within the confines of the line. The onus was upon the defendants to show some grant which permitted them to diverge from the line of their route into Eighth street and erect a station projecting two feet beyond the easterly line of First avenue. No such permission was shown, and that portion of the structure must, therefore, be assumed to have been built and maintained without the semblance of right (not as a *temporary* privilege but permanent erection) and the court below properly directed its removal.

In the construction of grants of franchises such grants are generally construed most favorably to the public and most strongly against the

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grantee ; nothing as a rule passes except what is expressed in unequivocal language. It follows, from the application of this rule, that as Eighth street was not included in the route designated by the rapid transit commissioners, and was not essential to the enjoyment of the franchise, it is, therefore, to be regarded as excluded.

The maxim *De minimis non curat lex* is never applied to the positive and wrongful invasion of another's property. The degree is wholly immaterial. Two feet of land in a thickly populated portion of a city is not so trifling as to deny the injured party the legal remedies necessary or proper for asserting the right of property thereto or to redress any trespass thereon.

*Held*, that the evidence satisfactorily sustains the findings of the court below both as to past damages and the value of the easements taken by the railway and station in First avenue.

Before FREEDMAN and MCADAM, JJ.

*Decided May 2, 1892.*

Appeal by the defendants from a judgment entered at equity term, awarding the plaintiff \$1,250 damages, and restraining the defendants from the further operation of their road, in front of the plaintiff's premises, No. 132 First avenue, unless within a time fixed by the decree they pay to the plaintiff the sum of \$5,000 adjudged to be the value of the easements taken, and directing the removal of such portion of their station as extends into Eighth street.

The facts are sufficiently stated in the head note.

*Davies & Rapallo*, attorneys, and *Julien T. Davies*, and *Brainard Tolles* of counsel, for appellants, argued :—

I. The amounts fixed by the trial judge as past damages and as the value of plaintiff's easements are excessive and unjust and altogether unsupported by legal evidence. There are decisions of this court, which show that it is quite possible for the award to be so high that there is a total failure of evidence to support it. *Sperb v. Metropolitan El. Ry. Co.*, 60 *N. Y. Super.*

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*Ct.*; *Cunningham v. Manhattan Ry. Co.*, 37 *N. Y. St. Rep.*, 366; *Siefke v. Metropolitan El. Ry. Co.*, 39 *Ib.*, 365. In the case last cited, the record weighed nearly two pounds and contained several thousand folios of testimony, yet it was held insufficient to sustain the judgment. It is not in the abundance of words, therefore, that a legal basis can be found for taking money from one citizen by judicial process and giving it to another. Such basis can be found only in fact, which by some fair process of reasoning, and not by misrepresentation or distortion or error of law, can be deemed to show actual damage. The question to be determined is whether the net effect upon this property of the existence and operation of the railroad has resulted in actual damage to this plaintiff. Plaintiff's interest in this property relates solely to the income produced by it. If the income would be less with the railroad and station removed, then there is no legal basis for this judgment. *Somers v. Metropolitan Elevated R. Co.*, 59 *N. Y. Super. Ct.*, 585; *Bohm v. Metropolitan Elevated Ry. Co.*, *Ib.*; *Newman v. Metropolitan Elevated Ry. Co.*, 118 *N. Y.*, 618; *Roberts v. N. Y. Elevated R. Co.*, 128 *Ib.*; *Matter of Brooklyn El. R. Co.*, 55 *Hun*, 165; *Doyle v. Metropolitan El. Ry. Co.*, 15 *Daly*, 473; *Gray v. Manhattan Ry. Co.*, 35 *N. Y. St. Rep.*, 32; *Brush v. Metropolitan El. Ry. Co.*, 26 *Abb. N. C.*, 73; *Welsh v. N. Y. El. R. Co.*, 35 *N. Y. St. Rep.*, 35; *Purdy v. Metropolitan El. R. Co.*, 36 *Ib.*, 43.

II. The trial judge erred in requiring defendants to shave off the easterly wall of their Eighth street station so as to bring it within the lines of First avenue. The easterly wall of defendants' station projects about two feet beyond the easterly line of First avenue. The trial judge awarded an unconditional injunction requiring defendants to remove this portion of the station. To this provision defendants excepted. This portion of the judgment we contend to be erroneous for seven different

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reasons: (1) Because the defendants had the same right to maintain this portion of the station that they had to maintain the rest of the station. (2) Because the maxim *de minimis non curat lex* applies. (3) Because plaintiff showed no special damage. (4) Because no cause of action based on lack of legislative authority was pleaded. (5) Because of the great public inconvenience that would be caused. (6) Because the injunction was sought in bad faith for the purpose of harassing defendants and not to protect plaintiff's own rights. (7) Because the plaintiff's laches and acquiescence was a bar to obtaining an absolute injunction. The court, after enumerating the various statutes and proceedings from which defendants' right to build and maintain their railroad was derived, has found as follows: "Defendants were also authorized and required by said statutes, and by the proceedings of said commissioners, duly had thereunder, to erect stations at convenient points along their route, and for that purpose were invested with a reasonable discretion in the choice of the location of said stations." The legality of investing defendants with such discretion was adjudged by the Court of Appeals in *Matter of Kings Co. El. R. Co.*, 112 *N. Y.*, 47; See also *Stirn v. Metropolitan El. Ry. Co.*, 21 *N. Y. St. Rep.*, 41. The principles which should guide the exercise of that discretion are laid down in the case first cited at page 59: "Of course it was not necessary to direct that stations should be built, for without them no capital would construct the road, nor to say that, in the main and as a general rule, they should be built at the cross-streets for the interest of the company and of the public would concur in that." And in *Ryan v. Manhattan Ry. Co.*, 121 *N. Y.*, 126, the same idea was still further expressed as follows (p. 131): "The locality of the stations is determined by the public convenience. The fundamental law to which the elevated railroads owe their existence required them to

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be sufficient and suitable to accommodate public travel. They must not be too far apart or too few in number, and must, ordinarily, be placed at street-crossings. There only do they gain sufficient room and light and convenience of access." What is the use of placing stations at street-crossings in order to gain room, if the law erects an invisible and impassable barrier across the intersecting streets which prevents the use of any portion of such streets either for stairways, stations or approaches? It must be remembered that the law which is to be interpreted and which the Court of Appeals had in mind in rendering the decisions to which we have referred, was a general law governing the establishment of stations along the whole route, not alone on wide avenues but also on very narrow streets. The railways authorized by the rapid transit commission were intended to be constructed on three different classes of streets. The first were streets less than 36 feet in width, the second those between 36 feet and 55 feet, the third, those over 55 feet in width. On all these streets stations were likely to become necessary. The 46th requirement is: "Each station shall have ample space, under cover, to accommodate the passengers." How could this requirement be complied with in narrow downtown streets, unless the railroad companies were authorized to make use of such portions of the cross-streets as were reasonably necessary for that purpose? The rapid transit commissioners well knew, when they framed these requirements, how the problem had been solved in the case of the then existing stations on the west side. Take the case of the important station at Greenwich and Rector streets. Greenwich street, at this point, is about fifty feet wide. How could a station capable of accommodating the public be provided without extending into the cross-streets? And is the station, therefore, illegal? Precisely the contrary was held by this court with reference to that very station in the case of

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Glover v. Manhattan R. Co., 51 *N. Y., Super. Ct.*, 1. In that case Judge INGRAHAM, instead of granting an absolute injunction against the portion of the station which was in Rector street, granted an injunction *with opportunity to condemn*. This was an adjudication that that portion of the station was lawful, so far as the public authority to maintain it was concerned. No ground exists for an absolute injunction in this case which did not equally exist in the Glover case. It may be justly claimed that where a duty is imposed by statute upon a railroad company, the company is impliedly vested with such powers not expressly withheld nor foreign to the general scope and purpose of its creation, as are reasonably necessary to the performance of the duties imposed upon it by the statute. *N. Y. C. & H. R. R. Co. v. Kip*, 46 *N. Y.*, 546. While statutes granting powers to corporations should be construed strictly, they should not be so literally construed as to defeat the objects for which they are enacted. Where the question is one affecting solely the public right, and the point in dispute is whether the public consent has been given to the substitution of one public use for another public use of a street, there is no particular occasion for applying the rule of strict construction. It is be remembered that the question attempted to be raised by plaintiff as to the authority to maintain the portion of the station which extends into Eighth street is raised by him in virtue of his right as a member of the public, and not in virtue of his right as an owner of private property. That he has no standing to raise the question in the latter capacity appears from the following consideration: Under § 17 of the Rapid Transit Act, defendants have undoubted authority to condemn plaintiff's entire property, lot and buildings, and easements and all, for station purposes. So that, merely by virtue of the ownership of that property, he can hardly claim to dispute their right to acquire, upon making due com-

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pensation, such an infinitesimally small fraction of his easement, as is taken by the rear wall of this station. Plaintiff, then, so far as this portion of the judgment is concerned, has no standing in court, except as a representative of the public right. The statutes involved are to be construed precisely as they would be construed in an action brought by the attorney-general on behalf of the people. Would there be in such an action any reason for subjecting these statutes to so strict a construction as is here claimed? It is apparent that there is here no such opposition of interest between the public and the corporation as calls for an application of the rule of strict construction. The interests of the public and of the abutting owners and of the corporation are identical, and all point to one course. That is to build the stations at the intersection of the cross-streets, and as nearly square in form as possible. This is the form which is safest and most convenient for the public, and which affords the maximum amount of area under cover with the minimum obstruction of light and air and the minimum cost of construction. A long, narrow station may obstruct ten times as much light and air, and cost twice as much to build as a square station projecting a few feet into the cross-street. There is, therefore, nothing in the circumstances to justify an application of the rule of strict construction. Such a rule is appropriate to the construction of a grant of lands, where the grantor must lose what the grantee gets. It is appropriate to the construction of a grant of the power of eminent domain, because the grantee takes in derogation of the common law. But where the interests of all parties are in harmony, where there is no particular mischief to be guarded against, and where the question relates merely to the substitution of one public use for another, the construction to be given the statute should be fair and reasonable and in aid of the general purpose of the enactment. The plaintiff's argument rests solely upon

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the fact that the commissioners designated a route for the railway, and that Eighth street was not included in the route. It is not denied that the rapid transit commissioners had power to permit the location of the stations in the side streets. It is not denied that they vested the defendants with a general discretionary power as to the location of the stations. It is not contended that that power has been unreasonably or unwisely exercised. But the claim is, that because Eighth street was not included in the route designated by the commissioners, therefore, the portion of the station which projects into it is necessarily illegal. No one would suppose from the language of the commissioners' requirement that in fixing the route of the railway, they intend to place any limitation on the location of stations. The route, on its face, does not purport to do more than to define the course of the tracks upon which trains were to move. The authority to erect stations was a thing altogether apart from and supplemental to the designation of the route. The interests of all parties demanded that the company should be left free to place its stations at corners where experience showed that they were convenient for the public use and beneficial to the adjoining property, rather than in places designated by the commission, where, perhaps, they might prove to be unwelcome to the abutting owners and of little use to the public. It was therefore necessary, in order that the company might enjoy this liberty, harmful to no one and beneficial to all, that the authority to locate stations should be general and unlimited, subject only to the requirement that no more space should be occupied than was reasonably necessary. In granting such general authority it was impossible to anticipate at what particular cross-streets the stations would be placed, or to what extent, if at all, the accommodation of the public would require such cross-streets to be made use of. The number of passengers using this particular station has

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increased 250 per cent. since it was opened, and if the same rate of increase were to continue indefinitely in the future it might, at some time, become necessary to enlarge the station instead of curtailing its dimensions. The mere failure of the commissioners to include Eighth street in the route has therefore no bearing or significance whatever. The question was one which in its nature had to be disposed of generally and not specifically. The provisions of the rapid transit act in respect to stations have been the subject of a uniform interpretation by the public and municipal authorities for a long period of years. This is manifest from the finding: "*Thirty-fifth*: Said railroad and station were constructed, and have since been maintained and operated with the consent and by the authority of the mayor, aldermen and commonalty of the city of New York." When it is remembered that the city of New York has the legal title and custody of Eighth street, this finding will be seen to have an important bearing as showing the actual interpretation which this statute has received from those charged with its execution. This interpretation has extended not only to this particular station but to many others throughout the city. The application to most of these stations of the strict rule contended for by the present plaintiff would result not only in great public inconvenience, but also in a far greater interference than at present with the light and air of abutting owners, since if the stations are to be driven out of the cross-streets it will become necessary to lengthen them on the ends so as to afford that degree of accommodation to the public which the law requires. It should be borne in mind that this well-settled interpretation of the rapid transit act is not confined to the railway companies or to the public and municipal authorities. It has been shared by the courts and by the abutting property owners almost universally. Judicial notice may be taken of the fact that very many judgments have been rendered by

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this court and other courts in this city, in reliance upon which the elevated railway companies have paid large sums of money for the right to maintain their various stations, including those portions which extend into side streets. It is true that the present plaintiff was no party to these judgments, yet they show a well-settled judicial construction of the act in question which ought to be of great weight in determining a matter of *public* right. Upon a matter of *private* right plaintiff might perhaps claim that precedent should be disregarded. But when he appears, under suspicious circumstances, as a voluntary and unaccredited champion of the public right, the long-continued and well-marked acquiescence of the public itself in a particular construction of the statute, which is obviously for the public benefit, ought not to be left out of account. An interpretation of a public statute which is not only contemporaneous but long-continued and well-settled; which has been acquiesced in and fostered not only by the executive but by the judicial officers of the State; in reliance upon which large sums of money have been expended and important interests have grown up; which is beneficial to all parties concerned, and is reasonably necessary to effect the general purpose of the act; which is opposed neither to any express enactment nor to any consideration of public policy, nor to any principle of justice or equity; and which is sanctioned by long custom, many precedents, and by the express language of the Court of Appeals—such an interpretation, we say, ought not to be lightly set aside to gratify private greed or a professional grudge. *Power v. Village of Athens*, 99 *N. Y.*, 592; *People v. Lacombe*, 99 *Ib.*, 43; *People v. Dayton*, 55 *Ib.*, 367; *Easton v. Pickersgill*, 55 *Ib.*, 310; *Smith v. People*, 47 *Ib.*, 330; *People v. Commrs. of Taxes*, 6 *Hun*, 109; *Fort v. Burch*, 6 *Barb.*, 73; *DuBois v. Brown*, 1 *Den.*, 317; *Hall v. Supervisors*, 66 *How. Pr.*, 330; *VanLoon v. Lyon*, 4 *Daly*, 149; *Brown v. U. S.*, 113 *U. S.*,

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568; *In re Warfield*, 22 Cal., 51; *Morgan v. Crawshay*, L. R., 5 H. L., 320. Assuming that the portion of the station in question is without authority of law, and that plaintiff is entitled to represent the public in attacking it, we submit that the evidence shows that the interference with the public right in Eighth street is too slight and trivial to be made the basis of an injunction. Obviously plaintiff stands in no better position to attack the portion of the station in question, on the ground of illegality, than the attorney-general would occupy in a suit brought for that special purpose on behalf of the people. Plaintiff's demand cannot borrow vitality from the associated claim for compensation for taking his private property. If compensation for private property is sought the injunction should be alternative in form. If the public right is to be vindicated by an absolute injunction then substantial injury *from the particular portion of the station sought to be enjoined* must be shown. In this case the projection beyond the easterly line of the street is almost imperceptible, and was not in fact perceived by the plaintiff until a year after he bought the property. It does not and cannot interfere with any public use of the street in the slightest degree. Neither is it shown to interfere to any appreciable extent with the light or air of abutting property. There is plenty of evidence in the case of interference with light and air by the structure in First avenue, but there is none which applies to this small portion of the station which projects into Eighth street. The court has not found that any such interference results from that part of the station. It is not in front of any window, and so cannot cut off any light or air directly; while as far as concerns light and air coming obliquely into the Eighth street windows from the west, they would be cut off in any event by the portion of the station which is in First avenue and which is concededly legal. So that here is a perfectly harmless structure, for maintaining which

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neither the public nor the abutting owner could recover more than nominal damages. Against such structure an injunction should in no event issue. *McLaury v. Hart*, 121 *N. Y.*, 636, 643; *Genet v. D. & H. Canal Co.*, 34 *N. Y. St. Rep.*, 247, 254; *Purdy v. Manhattan R. Co.*, 36 *Ib.*, 43; *Jerome v. Ross*, 7 *Johns. Ch.*, 315; *Drake v. H. R. R. Co.*, 7 *Barb.*, 508; *People v. Met. Tel. Co.*, 31 *Hun*, 596. The case last cited is an exact parallel to the action at bar. The action was to restrain the completion of a telephone line in Twenty-first street, to remove the poles already erected and for damages. The action was tried by a jury who gave a verdict for six cents damages. Upon that verdict the court adjudged the poles a nuisance and ordered their removal. The facts show that plaintiff sustained no special injury from the two feet of station which projects beyond the easterly line of First avenue. There is no allegation of special injury from this source in the complaint and no finding of it in the decision. Such a finding was essential to give plaintiff any standing in court, to raise the question of public right. There is a long line of authorities, well-known to the court, which hold that in order to maintain an action for an injunction against a public nuisance it is necessary in any event that the complainant should have been specially injured. A few typical cases are *Fort Plain Ridge Co. v. Smith*, 30 *N. Y.*, 44; *Doolittle v. Supervisors*, 18 *Ib.*, 155; *Lansing v. Smith*, 8 *Cow.*, 146; *Dougherty v. Bunting*, 1 *Sandf.*, 1. Within the principle of these cases, plaintiff cannot sustain this portion of the judgment on the ground of a public nuisance. He has not merely failed to show a special injury, but he has failed to show any injury whatever from the portion of the structure in question. The evidence showed that the particular station in question was used by about ten thousand passengers daily. To shave off the rear wall of this station would require a complete remodeling of the station, inside and outside.

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Such changes would require a virtual closing of the station for a short period, and would impose discomfort and inconvenience upon passengers for a much longer period. The result of the operation would be to permanently diminish the space provided for the accommodation of a rapidly increasing passenger traffic. Such a change would be of absolutely no advantage to the public at large. And even to the plaintiff it could make no perceptible difference. His light and air would be no greater in amount nor better in quality; his facilities for access would not be increased. An injunction can be rightfully demanded only for the purpose of protecting some legal or equitable right of the plaintiff. When it appears that it is not sought for that purpose but for some ulterior end, the injunction will be refused. *Kimball v. Hewitt*, 17 *N. Y. St. Rep.*, 743. The slightest consideration of the circumstances of the case at bar will render it morally certain that this injunction has been obtained not for the purpose of protecting the plaintiff's rights but for the purpose of harassing and injuring the defendants. The great hardship to the latter from this judgment, the absence of all legitimate advantage to the plaintiff and the existence of another disputed question between the same parties with respect to the damage done by the structure in First avenue, all combine to render it extremely probable that this demand for an absolute injunction has been made not for any legitimate purpose but only to be used as a weapon wherewith to terrify defendants into the payment of large sums of money as compensation for damages which have never been sustained and which cannot be proved.

III. The learned trial judge erred in refusing to find that there were any benefits to plaintiff's premises from defendants' railroad. The defendants have the same right to have benefits considered in respect to the *amount* of damage as they have in respect to the *exist-*

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ence of damage. The method pointed out by the Court of Appeals for raising the question, is by proposing just such requests to find as were proposed in this case. It may be regarded as certain that the Court of Appeals will never tolerate a rule which absolutely prevents the raising of this question ; and to say that these exceptions are to be disregarded is substantially to lay down that rule.

*E. B. & C. P. Cowles*, attorneys, and *Charles P. Cowles*, and *Justus A. B. Cowles* of counsel, for respondent, argued :—

I. The right to abate a nuisance or to restrain its maintenance, is not lost by reason of the purchase of the property injuriously affected subsequent to the creation of the thing which constitutes the nuisance.

II. The Acts under which the Metropolitan Elevated Railway Company was incorporated and the proceedings had thereunder, do not empower that company to occupy any portion of Eighth street with its railway station or depot structure. *Mattlage v. N. Y. El. R. R. Co.*, 67 *How. Pr.*, 232 ; *Matter of Metropolitan El. Ry. Co. (in re Jones)*, *N. Y. Law Journal*, January 26, 1891 ; see page 1024, middle of column 2. Mr. Adler's property was one of the parcels included in the condemnation proceedings entitled *Matter of Metropolitan El. R. Co. (in re Jones)*. This same question was raised in these proceedings before Judge O'BRIEN, and was argued at length ; the petition was dismissed as to Mr. Adler, expressly upon this ground. Should the court desire to examine this question anew, we respectfully submit the following : Chapter 885, Laws 1872, the original Act incorporating the Gilbert Elevated Railway Company, provides, in section 3, that the route of the railway and necessary sidings, stations, etc., should be ascertained, designated and established by a board of commissioners, who should designate and establish the same, etc. Several Acts were passed amending this one, but in no par-

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ticular material to the present question (see Chapter 837, Laws 1873 ; Chapter 275, Laws 1874). Subsequently, in 1875, the rapid transit act was passed (Chapter 606, Laws 1875). Under this act commissioners were appointed, who located the route of the petitioner, designating and establishing the same, and also the sidings, stations, etc., as far and as particularly as the same ever have been designated. The route designated by the rapid transit commissioners, so far as is applicable to this case, is as follows : "Thence along Division street to Allen street ; thence along Allen street and First avenue to Twenty-third street." Inasmuch as the commissioners appointed under the rapid transit act fixed and established the route, etc., of the Gilbert Elevated Railway, afterwards called the Metropolitan Elevated Railway, it necessarily follows that the limitations contained in the rapid transit act applied to and limited the authority of the commissioners in designating such routes. Clearly they could not act beyond the scope of their authority as conferred by the legislature, and since the Metropolitan Elevated Railway Company bases its right to maintain its railway on the action of the rapid transit commissioners and their permission as designated in the route established, the corporation can carry its railway into no other street or any portion of a street not expressly included in the route designated by the rapid transit commissioners. Such was the express provision of the act under which the commissioners were appointed. "But no such corporation shall have the right to acquire the use or occupancy of public parks or squares in such county or the use or occupancy of any of the streets or avenues, except such as may have been designated for the route or routes of such railway and except such temporary privileges as the proper authorities may grant to such corporations to facilitate such construction." Chapter 606, Laws 1875, § 26, sub. 5. This provision expressly limits the authority of the commissioners. The

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reference to the route applies of course to the whole structure, sidings, switches, stations, etc., as well as to the main track. We do not question the right of the Metropolitan Elevated Railway Company to build and maintain stations along its route; the legislature has given it this authority and in any event it would follow as a necessary implication, but we do insist that the defendant can exercise only such power as the legislature has given it, and that, when an express provision is made confining the corporation to a route designated and established by commissioners appointed expressly for this purpose, such provision is to be construed strictly as against the corporation: that when the route is designated, this provision means that the corporation must keep the whole and every part of its structure, of whatever nature the same may be, clearly within the confines of such designated route. Stations, sidings and switches may be built on the line of the route, but they cannot be built off such route. When the commissioners designated the route as "thence along Allen street and First avenue to Twenty-third street," such designation referred in no way to Eighth street; it would be a violent supposition to imply authority to go into Eighth street from a grant of authority to occupy First avenue. This designation of route is just as much a part of the rapid transit act itself as if embodied in it and therefore, in determining the rights of the corporation thereunder, it should receive the same construction as if it were made expressly a grant of corporate power. It is an elementary rule in the construction of grants of franchises, that such grants are to be construed most favorably to the public and most strongly against the grantor; that nothing shall pass by such grants except what is expressed in unequivocal language, and that whatever is not unequivocally granted is deemed to be withheld, nothing passing by implication. *Langdon v. Mayor*, 93 *N. Y.*, 129, 147; *Syracuse W. Co. v. City of Syracuse*,

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116 *Ib.*, 167, 178. Applying this rule of construction, it must follow that inasmuch as Eighth street is not included in the route designated by the rapid transit commissioners, it must be construed to be excluded, with the same effect as if the designation of the commissioners expressly forbade the use and occupation of Eighth street by the railway or any part of the railway structure. It makes no difference how small a portion of the street is occupied, the principle is the same. If the petitioner has no authority to occupy Eighth street it has no authority to occupy any portion of the street, however small it may be. This question of legislative authority is not to be measured by the *quantum* of the wrong. Either the defendant has a right to occupy Eighth street or else it has no right to do so, and whether it occupies one foot or one hundred feet makes no difference, when the question to be determined is as to its legislative authority to acquire this property. The question presented is whether the defendant has power to do what it seeks to do. Whether the legislature granted it the franchise, privilege or right to acquire property in Eighth street. To do this the corporation must be able to show a legislative warrant on which to base its corporate action. *Matter of Niagara F. and W. Ry. Co.*, 108 *N. Y.*, 375, 383. Until this can be done the defendants must be compelled to remove that part of the railway, railway structure, station or depot station which extends into Eighth street.

III. The fee value of the easements taken by the defendants and the past damages as determined by the court are both very reasonable and are less than the evidence warranted.

IV. No errors were committed on the trial, and there are no exceptions to the rulings upon the admission or the exclusion of evidence which warrant a reversal of the judgment.

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Opinion of the Court, by McADAM, J.

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BY THE COURT.—McADAM, J.—The evidence satisfactorily sustains the findings of the court below both as to past damages and value of the easements. The only question requiring special mention arises on the part of the judgment which requires the defendants to remove that portion of their structure or station which projects into Eighth street.

The plaintiff does not dispute the right of the Metropolitan Elevated Railway Company to build and maintain stations along its established route. The legislature has given it this authority, and in any event it would seem to follow by necessary implication. But he insists that the defendant can exercise only such power as the legislature has given it; that when the route is designated, this means that the corporation must keep the whole and every part of its structure, of whatever nature the same may be, within the confines of the line, and that although stations, sidings and switches may be constructed on the roadway, they cannot be built off such route. The plaintiff is correct in his contention. The railway company has no right whatever to appropriate public streets or highways to its use without legislative sanction, and even then is bound to make compensation to the abutting owners for any injury done to their property by reason of any interference which its structure may cause to their easements of light, air or access, or any depreciation in fee or rental value resulting from the operation of its road. The onus was, therefore, upon the railway company to show some grant which permitted it to diverge from the line of its route into Eighth street, and erect a station projecting two feet beyond the easterly line of First avenue. No such permission was shown, and that portion of the structure must, therefore, be assumed to have been built and maintained without the semblance of right (not as a *temporary* privilege but permanent erection), and the court below properly directed its removal. This accords

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Opinion of the Court, by McADAM, J.

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with the decision of Judge O'BRIEN in dismissing condemnation proceedings affecting the same property. *N. Y. Supreme Ct., N. Y. Law J.*, January 26, 1891, p. 1024. In the construction of grants of franchises, such grants are generally construed most favorably to the public and most strongly against the grantee; nothing as a rule passes except what is expressed in unequivocal language. *Langdon v. The Mayor, etc.*, 93 *N. Y.*, 129, 147; *Syracuse W. Co. v. City of Syracuse*, 116 *Ib.*, 167, 178. Applying this rule, it follows that as Eighth street is not included in the route designated by the rapid transit commissioners, and was not essential to the enjoyment of the franchise, it is to be regarded as excluded. There is room for no other implication. The defendants urge that the interference with the public right in Eighth street is too trivial to be made the basis of a judgment for removal, on the principal of *De minimis non curat lex*. This maxim is never applied to the positive and wrongful invasion of another's property. The degree is wholly immaterial. *Seneca R. Co. v. A. & R. R. Co.*, 5 *Hill*, 175. Two feet of land in a thickly populated portion of a city is not so trifling as to deny the injured party the legal remedies necessary or proper for asserting the right of property thereto or to redress any trespass thereon. We find no error, and the judgment appealed from must be affirmed, with costs.

FREEDMAN, J., concurred.

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Statement of the Case.

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**PETER STASTNEY, RESPONDENT v. THE SECOND  
AVENUE RAILROAD COMPANY, APPELLANT.**

*Negligence, action to recover damages caused thereby.*

The plaintiff was a passenger on one of defendant's cars going up-town. At a point on First avenue, between 65th and 66th streets, the track was blocked by a broken-down van or truck, and the passengers, including the plaintiff, at the request of the conductor, engaged in the work of moving the car from the track and around the obstruction, that it might continue its journey. While thus engaged another car of defendant's, coming down the avenue, met with the same obstruction, and its conductor and driver proceeded to jump the car around on the east side of the track, and the same side upon which the plaintiff was engaged with the conductor, and thereby the plaintiff was caught between the cars and injured. If the car going down had been jumped to the west, as it should have been, the accident would have been avoided.

*Held*, that the plaintiff was lawfully on the street at the time, by request of the conductor of the up-town car, and had no warning of the danger, and cannot be said to have contributed to the collision or to the bringing on of the injury to himself, and it was for the jury to determine the question of negligence of the defendant in the premises. The motion of defendant's counsel to dismiss the complaint was properly denied, and the verdict of the jury was sustained by the evidence.

Before FREEDMAN and McADAM, JJ.

*Decided May 2, 1892.*

Appeal from judgment entered on verdict in favor of the plaintiff, and from an order denying a motion for a new trial.

*Merrill & Rogers*, attorneys, and *Payson Merrill* of counsel, for appellant.

*Louis J. Grant*, attorney and of counsel, for respondent.

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Opinion of the Court, by MCADAM, J.

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BY THE COURT.—MCADAM, J.—Plaintiff was, on February 27, 1890, a passenger in one of the defendant's cars going up-town. When the car reached a point on First avenue between 65th and 66th streets, it found the track blocked by a broken-down furniture van or truck. The passengers were requested by the conductor to get out and assist in getting the car off the track, so as to get around the truck that the car might continue its journey. The passengers, among them the plaintiff, obeyed the request, and while thus assisting, a car coming down the avenue, finding itself blocked by the same obstacle, "jumped" the track, but instead of "jumping" to the West, which would be the proper thing for it to do, it "jumped" to the East, and caught the plaintiff between the cars, doing him the injuries of which he complains. If the down-town car had "jumped" the track to the West as it should have done, the danger would have been avoided, but "jumping" toward the East naturally brought it in collision with the up-town car, and in this manner the damage was done. The plaintiff was lawfully upon the street at the time, by the invitation of the defendant's conductor in charge of the up-town car. He had no warning of the danger, and cannot be said to have contributed to the collision or to the bringing the injury upon himself.

The learned trial judge submitted the question of negligence to the jury, and they found for the plaintiff, on evidence which sustains their verdict, which was moderate in amount. The defendant's counsel moved to dismiss the complaint on the ground that the testimony and circumstances detailed neither proved negligence on the part of the defendant nor freedom from fault on the part of the plaintiff. The motion was properly denied, as the evidence and the inferences to be drawn from it were matters about which minds might differ, and it was for the jury to determine the question of fact involved.

Appellant's points.

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No error was committed during the trial, and the judgment and order denying the motion for a new trial must be affirmed, with costs.

FREEDMAN, J., concurred.

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THE MILLSTONE GRANITE COMPANY, RESPOND-  
ENT v. JAMES F. DOLAN, APPELLANT.

*Contract for the delivery of granite according to plans and specifications ;  
and also for furnishing extra granite, beyond the contract and not  
called for in specifications.*

The only question in dispute between the parties arises from a construction of the written contract, and a supplement thereto written at its foot, wherein defendant promised to pay extra for all stone work "that may not be called for in plans and specifications left at plaintiff's February 15, 1889." The court held that the plaintiff fulfilled the contract according to specifications, etc., and also furnished other granite work at request of defendant, for which he was entitled to payment under the supplemental agreement.

The facts and points in the case appear fully in the opinion of the court.

Before SEDGWICK, Ch. J., FREEDMAN and McADAM, JJ.

*Decided May 2, 1892.*

Appeal by defendant from a judgment entered upon the report of a referee.

*Earley & Prendergast*, attorneys and of counsel, for appellant, argued :—

I. The referee erred in admitting evidence of conversations between the parties occurring before the written contract, all of which was incompetent, and all admitted under objection and exception of defendant. It was

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Appellant's points.

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upon the evidence thus improperly admitted that the referee based his finding in plaintiff's favor that those exhibits were the specification of the granite plaintiff was to furnish, and this evidence thus materially prejudiced the defendant. It was error to admit it, because against the well settled rule of law that all prior and contemporaneous parol negotiations become merged in a written contract when made, the latter being entire and covering the undertaking of both parties in respect to the whole subject matter. A writing when once made in this way, must not be contradicted or varied or suffered to be affected by parol. And particularly so when the instrument is under seal. *Wilson v. Deen*, 74 *N. Y.*, 531; *Eighmie v. Taylor*, 98 *Ib.*, 288; *Marsh v. McNair*, 99 *Ib.*, 174; *Snowden v. Guion*, 101 *Ib.*, 458; *Englehorn v. Reitlinger*, 122 *Ib.*, 76.

II. The referee's decision is against the evidence and the weight of evidence. Notwithstanding that John P. Leo's plans and specifications were those mentioned in the written contract, and that the referee finds that same were the plans and specifications figured at Millstone on February 15, and left at plaintiff's office on that day, the referee deprives the same of all binding force and permits plaintiff an extra recovery for granite required by such plans and specifications. In so doing, he goes against the plain letter of the contract. The only evidence needed in the case outside of the writing was evidence to identify what plans and specifications were figured on, and what left at Millstone on February 15, 1889. When those were shown to be the plans and specifications of Mr. Leo, plaintiff could not go outside of same and show an understanding that other papers or specifications were to apply. To permit plaintiff to attempt to show this was wrong, but the evidence as given does not prove or establish the plaintiff's contention. It appears that defendant, having made contract for the stone work of the armory, and being solicited by plaintiff's

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Appellant's points.

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superintendent to take an estimate for the cut stone or granite from plaintiff came up to Millstone Point on February 15, 1889, and gave to plaintiff's officers plans and printed specifications to figure and make estimate upon. Superintendent Davis then took such plans, and together with Ladd, plaintiff's draughtsman, spent several hours from one P. M. till evening figuring, taking sizes for granite shown thereby, and calculating the number of feet of granite required, and the cost to plaintiff of the cutting, and used four sheets of paper in making pencil memoranda of sizes, number of feet and expense to plaintiff of cutting. Davis and Johnson then went in another room and out of Dolan's hearing, and made some calculations, and then Johnson says: "I came into the other room and told him or gave him that writing which you have here after some conversation." The writing so given to Dolan is Defendant's Exhibit 1. It is addressed to Dolan, dated February 15, 1889, and signed by Millstone Granite Co., Chas. S. Johnson, Treas., and by it the company agrees to cut, furnish and deliver all the granite work complete for the 22d Regt. Armory, according to plans and specifications made by Mr. J. P. Leo, architect, for \$12,050. Dolan took that writing and returned to New York, leaving the plans and specifications he had brought, and which ever after remained with the company until produced by it on this trial. A few days after, Dolan being again at plaintiff's office, the contract set forth in the complaint was signed in duplicate, and duplicates exchanged, which contract was, as will be noticed, in precisely the same terms as the writing or estimate, given to Dolan by plaintiff previously, providing for plaintiff to furnish all the granite according to Leo's plans and specifications, the ones figured on at the company's office on February 15, for \$12,050. Thereupon the plaintiff's granite was furnished in 18 different shipments, covering a period extending from February 15, 1889, to January 14, 1890. When the job was over the aggregate of the

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Appellant's points.

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bills of shipments at the charges made by plaintiff upon the bills, made a little over \$16,000. And then, notwithstanding plaintiff had agreed to furnish all the granite for \$12,050, it took the bills for some of the last shipments, making a total of \$4,238.78, and made a claim that same was extra, because, as it claimed, the stones charged for thereon were not mentioned upon the four pencil sheets used in making memoranda before the contract was made. Defendant refusing to pay any more than the contract price, plaintiff sued for the sum so claimed as extra, and the referee sustained their claim upon a finding; that the specifications and plans mentioned in the contract referred to the stones listed on the four pencil sheets, and had been accepted by defendant as showing the granite to be furnished under the contract. This finding, it is submitted, is against the weight of evidence. There is no evidence anywhere in the case of any request of the defendant for any extra stones, and the plaintiff's right to recover is grounded solely on the claim that it furnished more stones than enumerated on the four pencil sheets, and for the surplus should be paid extra. While defendant's claim is that as plaintiff furnished no more stone than was called for by the plans and specifications made by Mr. Leo, with which he had agreed to comply, plaintiff has not earned any more than the contract price, subject to the deductions for certain stone which plaintiff left out, and which defendant had to furnish himself. It will be perceived that the case turns on the question, what were the plans and specifications referred to in the contract, plaintiff agreeing therein to furnish all the granite required by same. Upon this question we renew the contention we made under the first point, that the negotiations and transactions occurring prior to the contract cannot be considered or be permitted in any way to govern the rights of the parties, and that evidence of the same was improperly admitted.

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Respondent's points.

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*Cannon & Atwater*, attorneys, and *Frank Bergen* and *Henry G. Atwater* of counsel, for respondent, argued:—

I. There is no statement in the case as made and settled that all the evidence given upon the trial is contained within it, and in the absence of such a certificate the general term will not review the case upon the facts. This rule is so well settled and has been so often enforced by this court, that no extended argument on it is needed, but a few of the recent authorities are given : *Davis Sewing Machine Co. v. Best*, 50 *Hun*, 76 ; *Wellington v. C. C. & I. C. Co.*, 52 *Ib.*, 408 ; *Murphy v. Board of Education*, 53 *Ib.*, 171 ; *Brayton v. Sherman*, 28 *St. Rep.*, 854 ; *Porter v. Smith*, 107 *N. Y.*, 531 ; *Halpin v. Phenix Ins. Co.*, 118 *Ib.*, 165 ; *Aldridge v. Aldridge*, 120 *Ib.*, 614 ; *Goodrich v. Gillies*, 42 *St. R.*, 321.

II. None of the exceptions taken on the trial call for a reversal of the judgment. It may be well to point out one or two other facts before proceeding to consider the exceptions on which the defendant relies. (1.) One of the sheets of the drawings for the armory which Dolan took with him to Millstone Point showed a tower of considerable dimensions, and when he was pointing out to the employes of the company what parts of the building were to be granite on which he wished the company to estimate, he stated that they need not figure on anything above a point just below the tower. All of the extra material charged for in the bill of particulars, was used in constructing the tower, and of course was not included in the primary contract. (2.) The principal part of the building was to be of brick, the water table, trimming, etc., to be of blue stone and granite. The parts of the plans taken by Dolan to the company's office on February 15 did not indicate what parts of the building were to be of granite, so that persons, although skilled in the business of estimating, could ascertain

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Respondent's points.

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from them, even approximately, what parts were to be of granite; nor did the printed specifications supply the information. The four pencil sheets show that 12,725.21 cubic feet of granite were required by the primary contract. (Plaintiff's exhibits "F," "G," "H," and "I".) Under the supplemental contract 2,420.8 cubic feet were furnished, making in all 15,140.01 cubic feet actually put into the building. To be strictly accurate it should be said that 1,500 cubic feet were omitted from the sally port in actual construction by agreement, although shown on the plans, and a few feet were also omitted from the tower by consent because of a reduction in the size of the stone shown on the plans. Now it appears in the case that parties of long experience in making estimates could find no such quantity of granite to be required by the plans and specifications. Peter Nolan, a man of thirty years' experience, made an estimate on the plans on December 21, 1888, for the purpose of obtaining a contract for the work, and could only find that 11,958.9 cubic feet were required. He says he included in his estimate all the granite to be furnished under the plans and specifications the best he could understand them. He says he found the plans and specifications indistinct and obscure. Mr. Dutton and Mr. LePoidevin also found the plans to be indefinite, and Ladd and Johnson testified to the same effect. The issue in the case is so largely a question of fact, which has been finally settled by the referee, that there seems little, if anything, open for discussion here. The defendant's theory of the case, as indicated by the record, is based on assumptions that are plainly untenable. He insists that the contract of February 15, 1889, referred to all the plans for the building and to the printed specifications. The fact is, however, that only a part of the plans were taken to Millstone Point on February 15, and the printed specifications were not seen on that day by the officer of the company who made the proposition

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Opinion PER CURIAM.

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and afterwards signed the contract. Besides, the plans themselves were so indefinite that the quantity of granite required could not be estimated from them within four thousand feet of the real quantity needed, and the specifications referred to in the contract were the four pencil sheets, not the printed document. Again, it will be remembered, that when Dolan presented a draft of a contract to the company for execution a few days subsequent to February 15, 1889, containing a clause requiring the company to furnish "all the granite work," the company's representative required him to strike out those words, and insert words which required the company to furnish granite "per specifications and plans as figured on at the office of the Millstone Granite Company at Millstone Point," on February 15, 1889, for the avowed and well understood purpose of limiting the quantity to that indicated on the four pencil sheets.

PER CURIAM.—The action is for the price of granite, worked, sold, and delivered by plaintiff to defendant. A construction of the written contract, will decide the dispute between the parties. By that, the plaintiff agreed that they would work for the Twenty-second Regiment Armory building, on trucks, agreeably to the drawings and specifications made by John P. Leo, architect, and signed by the said parties, and hereto annexed, in a good, substantial and workmanlike manner to the satisfaction and under the direction of the said John P. Leo, and also shall and will find and provide such good, proper and sufficient materials of all kinds whatsoever as shall be proper and sufficient for the completing and finishing, all the granite work per specification and plan, figured on at the office of the company at Millstone Point at this date, of said building mentioned in the specification, for the sum of \$12,050.

The appellant contends that for the price named the plaintiff was to furnish all the granite work disclosed by

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Opinion PER CURIAM.

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the drawings and specifications of John P. Leo, architect. This is not correct, for, by the contract, work upon the granite is to be done in accordance with such plans and specifications, but the granite work to be furnished was such as was described in specification and plan, figured on at the office of the company. In fact there had been such specification and plan figured on at the office, and they were not the same as the drawing and specifications of Leo, being but a part of the latter. The figuring was upon four sheets of paper.

The evidence in the case sustains this construction of the contract, and shows its reasonableness. There was in the contract made a reference to extra work. When the granite had been partly delivered, the defendant agreed in writing "to pay for all extra stone work that has not been called for in plans and specification left at your office, February 15, 1889, at time of making contract, etc."

The plaintiff fulfilled the contract to furnish granite according to the specification figured, and also furnished other granite work at request of defendant. The defendant contested plaintiff's right to recover this extra granite, on the ground that the granite work was called for by the plans and specifications of John P. Leo. We have construed the contract otherwise. The plaintiff was entitled to recover upon the balance due under the contract and for the extra work.

Judgment affirmed, with costs.

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Appellants' points.

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CHARLES H. SMITH, PLAINTIFF v. MATILDA F.  
LOCKWOOD, ET AL., EXECUTRIX, ETC., DEFEND-  
ANTS.

*Action for the breach of a written agreement by the testator of defendants.*

The agreement provided for the payment of one hundred and fifty shares of capital stock of the Staten Island Water Supply Company, when the water works that the defendants' testator were building under contract were turned over and accepted by said company. Before the water works had been accepted, and before the completion of the contract in regard to them, defendants' testator assigned his contract to another party and procured a release from the company.

*Held*, that on the face of the contract, and from extrinsic circumstances, it appears that the acceptance was referred to only as a date or time of payment of the capital stock. It also appears that the testator was solely responsible for the acceptance never taking place. He could not by his own act dissolve the obligation of the contract, and his executors are liable upon it.

The facts and points in the case appear in the opinion of the court and the arguments of counsel.

Before SEDGWICK, Ch. J., FREEDMAN and McADAM, JJ.

*Decided May 2, 1892.*

Defendants' exceptions at the trial of the action to the denial of his motion that the complaint be dismissed, and also his motion that a verdict be directed in his favor, were ordered to be heard in the first instance at general term, as also his exceptions to the verdict of the jury, under the direction of the court, for \$10,000.

*L. L. Van Allen*, for defendants, appellants, argued:—  
August 28, 1879, the Staten Island Water Supply Co. and John Lockwood & Co. executed an agreement

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Appellants' points.

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for the construction of water works on Staten Island. That agreement was somewhat modified by a supplemental contract, October 5, 1880. November 7, 1881, Lockwood & Co. notified the Staten Island Water Supply Co. that they had transferred their contracts to one R. Patten. The day following, the company, at a meeting of the board of its directors, passed a resolution ratifying the transfer, and releasing Lockwood & Co. Plaintiff was a director of the company, was present at that meeting, and voted for the resolution. April 30, 1880, plaintiff and Lockwood & Co. executed an agreement, a copy of which is annexed to the complaint, in which the latter agree to transfer to the former, upon certain conditions contained therein, three hundred shares of the stock of the company. One hundred and fifty shares thereof were transferred October 22, 1881. The agreement provides for the transfer of the balance, as follows: "And the remaining one hundred and fifty shares, when the works are turned over to and accepted by said company." That has not been done, and the amended complaint admits it. (*First.*) The complaint should have been dismissed. The contract between the parties hereto is definite and certain. The works have not been turned over and accepted by the company. That was a condition precedent, and until its accomplishment, the one hundred and fifty shares were not to be paid. The amended complaint admits that the further performance of the agreement between Lockwood and the company was on the 8th day of November, 1881, "duly waived." That was the date on which the resolution was passed, confirming the transfer from Lockwood to Patten. (*Second.*) The element of estoppel is enforceable in this case. The essentials constituting it—"declaration made or act done by the party against whom the estoppel is claimed." "That the party claiming the estoppel relied upon such declaration or act," and "That the party claiming the estoppel would be injured if the

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Respondent's points.

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other party were permitted to retract his declaration, or undo his act," are clearly applicable. *Real Estate Trust Co. v. Balach*, 45 *Sup'r*, 528. In *Pickard v. Sears*, 6 *Ad. and Ell.*, 475, Lord DENHAM, says: "The rule of law is clear that when one by his words or conduct causes another to believe in the existence of a certain state of things, and induces him to act on that belief, the former is concluded from averring a different state of things." It is not essential that the party sought to be estopped should design to mislead. If his act was voluntary and calculated to mislead and actually has misled another acting in good faith, that is enough. *Trustees, etc., of Brookhaven v. Smith*, 118 *N. Y.*, 634.

*George L. Cheney*, for plaintiff, respondent, argued:

I. The excuse for non-payment is a default by the obligor himself. The excuse pleaded by Lockwood for not transferring these 150 shares to the plaintiff is, that the works have not been turned over to the company. But when we examine the case, we find it was Lockwood himself who agreed with the company to turn over these works, but who failed to do it, and then, by putting the contract out of his hands, put the performance of this obligation out of his own power. The law, however, does not suffer obligations to be evaded in that way.

II. Lockwood could not profit by his own default. Lockwood was under obligation to complete the water works, but failed to do so. Then he secured an extension of time to perform that obligation, and again failed. Then he transferred that contract, in the face of a notice from the plaintiff, and secured a release from the company, and thus obtained a final settlement from the company without turning over the works. By this voluntary non-performance of the act which was to mark the time for paying the plaintiff, Lockwood estopped himself from insisting on its performance. *Lee v. Decker*, 3 *Abb. Ct. of App.*, 53; *Gallagher v.*

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Respondent's points.

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Nichols, 60 *N. Y.*, 438, 448; *Risley v. Smith*, 64 *Ib.*, 576; *Home Bank v. Drumgoole*, 109 *Ib.*, 63.

III. The plaintiff is not estopped. The defendant Lockwood urged upon the trial, that the company's action in releasing him and accepting Patten was a defence here; because the plaintiff was a stockholder and director in the company, and was present at the board meeting and raised no objection when the company took that action. This theory, however, is untenable for obvious reasons. In the first place, Lockwood knew exactly what the real facts were, and was therefore not misled by the company's action or the plaintiff's silence. He was present himself at the board meeting as a director, and knew that the plaintiff was present there in the same capacity; and he has himself testified that the plaintiff at that meeting said nothing, and did not even vote in favor of the resolution. Lockwood knew that the action then taken was the action of the company alone; and he knew that the plaintiff had already given him full notice that the private contract with the plaintiff must be performed, irrespective of any such disposition as was there made of the contract with the company. And the actual transfer to Patten had been made before the meeting. In the second place, the disposition then made of the company's contract did not involve the abandonment of the plaintiff's contract. The two obligations were distinct. The liability of Lockwood to the plaintiff on the contract in suit, was no part of his liability to the company on the contract released. His obligation to pay the plaintiff for the past services was not even incident to his obligation to perform for the company the contract to build its works. So the destruction of the latter obligation would not operate to destroy the former. The only point in the private contract which could be affected by the abandonment of the contract to build the works, was the provision fixing the date for paying the final installment;

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Respondent's points.

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and the nature of the effect on that point, as laid down in the cases above cited, is to strengthen the private contract and accelerate the date for payment. In the third place, the plaintiff did not assent, either in fact or by implication, to any modification or postponement of Lockwood's obligation to pay him the stock. The plaintiff had, on the contrary, expressly refused to assent to any impairment of his right to such payment. He gave Lockwood complete notice that the obligation to transfer the stock would be strictly enforced. The plaintiff's silent presence at the board meeting, in the capacity of a director, did not operate as an adoption of the company's action for his own, in the capacity of an individual. He and Lockwood met there as fellow-directors on the company's business, not as a debtor and a creditor adjusting their private relations; and Lockwood knew it. Their private affairs could not be intruded in fact, much less by implication, at such a meeting. The plaintiff's silence as to his private interests, at the board meeting, his not raising those interests there in opposition to the company's action, was the silence of a director, imposed upon him by the duties of his trust office, and not the independent conduct of a free individual acting in his own behalf. No inferences upon which to base an estoppel could be drawn from such reticence, even if the plaintiff had not given Lockwood the preliminary notice already referred to. Moreover, and quite apart from the director's duty not to obtrude his personal interests in opposition to the board's action, the knowledge Lockwood had of the plaintiff's private rights would deprive the plaintiff's silence of any effect upon those rights. Failure to object to a proposed wrong never estops the injured party, if his rights were already known to the person invoking the estoppel. *Martin v. Angell*, 7 *Barb.*, 407; *Hutchins v. Hebbard*, 34 *N. Y.*, 24; *Viele v. Judson*, 82 *Ib.*, 32; *N. Y. Rubber Co. v. Rothery*, 107 *Ib.*, 310.

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Opinion PER CURIAM.

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PER CURIAM.—The testator in his life-time made, with the plaintiff, an agreement whereby he promised to pay and transfer to the plaintiff three hundred shares of the capital stock of the Staten Island Water Supply Company, the payment and transfer to be one hundred and fifty shares upon payment to him by said company of one-half of the stock to be paid to him, pursuant to the contract with the company, and the remaining one hundred and fifty shares when the works are turned over and accepted by said company.

The action concerned only the last installment of one hundred and fifty shares. The defence was that the works had never been turned over and accepted by the company. The reply to this is satisfactory. Before the works had been accepted by the company the testator, in his life-time, before the completion of his contract, assigned it to a third party with the approval of the company, that at the same time released Lockwood, defendant's testator.

On the face of the contract, and from extrinsic circumstances, it appears that the acceptance was referred to only as a date or time of payment. The testator was responsible solely, so far as appears, for the acceptance never taking place. He could not by his own act, dissolve the obligation of the contract, and his executors remain liable upon it.

The plaintiff was present at the meeting of the directors who released Lockwood from the contract. But he did not vote for or promote in any way the assent of the company to Lockwood's assignment of the contract or his release. Nothing shows any assent on his part to the course taken by Lockwood.

Defendant's exception overruled and judgment ordered for plaintiff on verdict, with costs.

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Appellants' points.

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PROSPER MONNET, ET AL., APPELLANTS v. HENRY  
MERZ, RESPONDENT.

*Principal and agent, action for an accounting between them.*

An agent cannot be allowed, for an amount paid by him, to compromise an action in which his principal and his principal's goods were affected, unless the agent establishes by evidence that he was specially authorized to compromise the same, or the nature of his agency clearly authorized him to so compromise such action and pay said amount.<sup>1</sup>

Before SEDGWICK, Ch. J., FREEDMAN and McADAM, JJ.

*Decided May 2, 1892.*

Appeal by plaintiff from a judgment entered on the report of a referee.

The facts and points in the case appear fully in the opinion of the court. In the trial of the case the referee declined to allow to the defendant the whole of the claim but allowed him one-half, and defendant appealed from such ruling, and the general term sustained the referee (57 *N. Y. Super. Ct.*, 576), and the Court of Appeals modified the judgment by striking out the allowance of one-half made by the referee, *Monnet v. Merz*, 127 *N. Y.*, 151. The plaintiff now appeals from the judgment entered upon the report of the referee allowing defendant one-half of said amount.

*Arnoux, Ritch & Woodford*, attorneys, and *William H. Arnoux* of counsel, for appellants, argued:—

The allowance of the amount appealed from was erroneous and should be reversed. This was so decided by this court. The language of the decision is this: "The defendants had the burden of showing that they

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Respondent's points.

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were authorized to compromise said action ; that is, that they were specially authorized by the plaintiffs in this action to compromise, and that they were authorized from the nature of their agency. They have failed to prove either one of these facts. The referee refused to find that the goods described in the invoices that were made for the entry of the goods had been undervalued, and his finding is warranted by the evidence. If there was no undervaluation there was no reason why the action should be compromised, and the defendants in compromising the action acted at their own peril." When the case reached the Court of Appeals, BROWN, J., carefully examined the authorities cited in our original brief and approved the same. This logically and inevitably led to the conclusion that the court was right and the referee wrong. *Monnet v. Merz*, 127 *N. Y.*, 151, 156.

*A. P. & W. Man*, attorneys, and *William Man* of counsel, for respondent, argued :—

The findings of the fact of the referee are ample to support his allowance to defendants of one-half the compromise sum paid to the government. Plaintiffs, not defendants, made up the invoices ; defendants did not know the cost of the goods, made by a secret process ; the invoices were made by plaintiffs and furnished to defendants for the express purpose of being used by defendants to " enter " the goods for payment of duties. Defendants used said invoices in good faith in entering the goods. The government suit was brought on the ground that plaintiff's invoices were fraudulent, and plaintiffs thereupon authorized the employment of counsel on their behalf. That plaintiffs requested defendants to settle and compromise said government suit at any sum that should be found necessary, of which plaintiffs agreed to pay half. That negotiation was made by defendants through plaintiff's attorneys for settlement, which settlement at \$10,000 defendants paid. The

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Respondent's points.

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money, \$10,000, for the compromise, was deposited with the government (with the proposition for settlement) by the defendants October 9, 1882, and the settlement was made and the money accepted by the government March 2, 1883. The defendants notified plaintiffs by letter of November 11, 1882, and again by letter of February 20, 1883, of the proposition to settle and the deposit of the money; both of these letters were received by plaintiffs. The defendants never repudiated or refused to be bound by this action, except so far as their telegram of February 8, 1883, may be construed as a revocation (of their agreement to pay half) and this telegram was: "We refuse Custom House compromise of seventy thousand francs." Our compromise offer was 50,000 (not 70,000) francs, as plaintiffs knew by our letter of November 11, 1882, received by plaintiffs as early as November 28, over two months before this telegram. The telegram, therefore, did not refer to our \$10,000 offer made in October preceding. The referee, therefore, holds that the plaintiffs having offered to pay half of any sum required to settle with the government, which offer they never revoked or withdrew, and we having settled for \$10,000, we are entitled to be allowed one half that sum as against any claim of plaintiffs. It is true that the referee finds that on February 9, 1883, the plaintiffs, by telegram, revoked any authority to compromise; but he has also found that the only such telegram was the one there stated, which most certainly does not purport in any way to revoke the authority to settle and compromise on joint account. If two findings conflict, we, as the respondents, are entitled to the benefit of any presumption, as we are seeking to uphold the judgment, and presumptions will not be indulged in to upset it. The referee's findings, therefore, amply support his allowance to the defendants of one half the \$10,000 paid to compromise with the government. Every presumption is to be indulged in favor of the

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Opinion PER CURIAM.

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judgment. *Standard Oil Co. v. Triumph Ins. Co.*, 64 *N. Y.*, 85. It is incumbent on the party seeking the reversal to show affirmatively that an error was committed to his prejudice. *Tracey v. Altmeyer*, 46 *N. Y.*, 598, 604; *Appleby v. Erie Co. Savings Bk.*, 62 *Ib.*, 12, 18. It is not enough to show that error may have been committed. *Smith v. Newland*, 9 *Hun*, 553, 554; *Philip v. Gallant*, 62 *N. Y.*, 256, 265.

PER CURIAM.—The action is virtually for an accounting between the plaintiff, a foreign consignor, and the defendant, his consignee in this country. This appeal involves the correctness of a ruling which charged the appellant with the sum of \$6,126.09. That charge arose from the following facts. The plaintiff consigned certain goods to the defendant. After they had arrived in the country, the United States began a suit against the defendant to recover \$75,000, under sections 2839–2864, *U. S. Rev. Stat.*, and section 16, *Act of June 22, 1874*. On February 9, 1883, the United States accepted from the defendants an offer of compromise of \$10,002.12 and discontinued the action. The respondent claims the amount paid in compromise should be charged to plaintiff. The claim is not valid for the reasons stated in *Monnet v. Merz*, 127 *N. Y.*, 151, unless it appears by the evidence on this appeal that the plaintiff authorized or took part in the compromise. The evidence does not show any authority from the plaintiff to compromise on joint account. A proposition to that effect made by the plaintiff to the defendant was refused by the latter. The offer did not thereafter continue. Nothing can be implied on this subject unfavorably to the plaintiff from his omitting to answer concerning the suit, for as to that he had no obligation. The telegram “We refuse Custom House compromise of 70,000 francs,” as there was but one compromise in a suit claiming 75,000 francs, clearly referred to the compromise for \$10,000. The

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Statement of the Case.

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defendant failed to establish that the plaintiff authorized or was a party to the compromise.

The referee charged the plaintiff with one half of the amount of the compromise. This was not valid, and the plaintiff's appeal should prevail. The appeal is only from the judgment so far as that is affected by the charge that has been examined. The judgment, therefore, should be reversed as to such matter, and a new trial ordered, with costs to abide the event, and the order of reference vacated.

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CLARK R. GRIGGS, PLAINTIFF v. MELVILLE C.  
DAY, ET AL., AS EXECUTORS, ETC., DEFENDANTS.

*Cross appeals from a judgment entered upon the report of a referee.*

Where a court has on a former appeal in the same case examined and decided questions in a case, it will not on a second appeal re-examine the questions or change or modify its former decision upon the same state of facts.

In this case, at the last trial, the parties stipulated that the evidence introduced upon the former trial, as printed in the case upon the former appeal, should be the evidence of the parties on the second and new trial.

*Held*, that all objections and exceptions to the admission or exclusion of evidence, as the same appeared in said case, were waived, and, therefore, no exceptions to the admission or exclusion of evidence were taken by either party on the new trial.

*Held also*, that the evidence as thus submitted supports the findings of fact made by the referee, and the findings of fact fully sustain the conclusions of law made thereon. The referee has given proper effect to the rulings made on the former appeal so far as they are applicable, and no exception appears on either side that calls for a reversal or modification of the judgment, and these appeals should be affirmed on the opinion and supplemental opinion made and filed by the referee.

Before SEDGWICK, Ch. J., FREEDMAN and McADAM, JJ.

*Decided May 2, 1892.*

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Opinion of REFEREE.

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Cross appeals from a judgment entered upon the report of a referee, whose opinion and supplemental opinion in the case was as follows :—

WILLIAM B. HORNBLOWER, REFEREE.—“ This suit is brought for an accounting for transactions growing out of the construction of the Wheeling and Lake Erie Railroad. It was originally referred for trial to the Hon. Rastus S. Ranson, as referee. He having been elected surrogate of this county before the conclusion of the trial, Hamilton Odell, Esq., was substituted in his place as referee. After careful consideration, the able and learned referee awarded judgment against the plaintiff for the sum of \$2,171,395.84. Upon appeal by plaintiff to the general term this judgment was reversed and a new trial ordered, and the issues were thereafter referred to me for hearing and decision. Upon the trial before me, the testimony taken upon the former trial was stipulated in evidence as the testimony on this trial, all exceptions to the admission or rejection of evidence being waived.

“ The general term assigned but a single ground for reversal, namely, that plaintiff should have been allowed a credit of a certain amount (fixed by the opinion of FREEDMAN, J., on the settlement of the order at \$1,736,600, with interest from May 1, 1883), and the learned Chief-Justice who delivered the first opinion of the court says : ‘ I do not think that any other exception of the plaintiff calls for a direction to correct the account in any other particular. The defendants’ exceptions, of course, have not been heard on the plaintiff’s appeal.’ The opinion directed that there should be a new trial, unless defendants should consent to a deduction, in which case the judgment should be affirmed. Subsequently, however, this direction was modified, after hearing counsel, and the court ordered ‘ an unconditional reversal of the judgment upon the facts as well as the

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Opinion of REFEREE.

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law,' and a new trial 'in accordance with the principles laid down in the opinion.'

"Under these circumstances, the first question presented for my consideration is, how far I must disregard the conclusions of the former referee, so far as they are not expressly overruled by the general term, the testimony before me being precisely the same as that which was before the former referee and the general term. It would be very grateful to me, and would save me much labor and responsibility, if I could hold that I am merely called upon to restate the account between the parties upon the principles laid down by the former referee as modified by the opinion of the general term; but upon reflection I am satisfied that I am bound under my oath as referee to consider the whole case *de novo* and to pass on all the contested questions of fact and all the doubtful inferences deducible from the uncontradicted testimony, precisely as a court and a jury would be called upon to do if this case were triable at circuit. Of course, I cannot be, and ought not to be, unmindful of or uninfluenced by the decision of the former referee, for whose character and ability I entertain the very highest respect, on any question of fact or law on which my own mind is in doubt.

"This suit was originally brought against Cornelius K. Garrison. He died pending the former trial and his executors were substituted in his place. The wife of Garrison was also originally made a party to set aside her inchoate right to dower in certain real property; but no relief is now asked against her, plaintiff's counsel abandoning any claim to a reconveyance of such real property.

"As the facts of the case will be fully set forth in my report, I shall not recapitulate them in this opinion, but shall confine myself to a brief statement of the conclusions, which I have arrived at on the main points in dispute between the parties. It is sufficient to say in

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Opinion of REFEREE.

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this connection that plaintiff had entered into certain agreements with the Wheeling and Lake Erie Railroad Company, an Ohio corporation, for the construction of its railroad between certain points designated, for which he was to receive compensation in stock and bonds of the company, based upon a mileage proportion—the company engaging on its part to furnish certain amounts for right of way, grading, bridging and tieing with a contractor's profit of ten per cent. In the fall of 1880 Garrison began a series of advances to plaintiff in aid of his work of construction, and out of these advances grew numerous dealings between plaintiff and Garrison, which gave rise to the controversies which form the subject matter of this action.

“On the 17th of December, 1880, the following paper was executed by Griggs and delivered to Garrison :

“ ‘ NEW YORK, Dec. 17th, 1880.

“ ‘ In consideration of a loan of forty thousand dollars this day made to me by C. K. Garrison, I, C. Robinson Griggs, do hereby transfer to said Garrison all the first mortgage bonds of the Wheeling and Lake Erie Railroad now in the Farmers' Loan and Trust Company, amounting to three million three hundred and seven thousand dollars (\$3,307,000), making, with one hundred and ninety-three thousand dollars held by W. W. Phelps and others, the entire issue of three million and five hundred thousand dollars. I further assign to said Garrison my construction contract with said company, and all stock to which I now am or may hereafter be entitled under said contract. I further authorize the sale of all or any part of said bonds at eighty-five per cent. net, and for every fifteen thousand dollars of bonds sold by said Garrison or myself or any other person I agree to transfer to said Garrison, and authorize him to retain from any stock to be received under said construction contract, seven thousand dollars of full-paid

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stock of said Railroad Company. All sums received from sale of bonds over the amount of loan and interest to be paid to me or my order.

“ ‘C. ROBINSON GRIGGS.’

“The plaintiff’s first claim upon this accounting is that the defendants should be charged with the proceeds of the sale of 3,407 first mortgage bonds of the railroad company at 85 cents on the dollar, or \$850 each, with interest thereon. This claim is based upon the theory that Garrison elected to purchase, and did in fact purchase, this number of bonds under the terms of the agreement between plaintiff and Garrison of December 17, 1880. Defendants dispute this claim. They admit that Garrison had an option to purchase any or all of the bonds in question under the terms of the agreement, and that he was bound to account to plaintiff for any bonds which he elected so to purchase at 85 cents on the dollar. As both parties agree upon this construction of the instrument, and as it was evidently so construed by Garrison and Griggs during the former’s life-time, it is unnecessary for me to pass upon the question of the correctness of this construction, although the agreement upon its face does not seem to contemplate a direct sale of the bonds, or any of them, from Griggs to Garrison. Defendants’ counsel admits that Garrison, in point of fact, purchased under this contract at 85 cents on the dollar 2,457 bonds, for which he gave credit to the plaintiff in the account with accrued interest from the previous interest day to the assumed date of purchase, namely, 1,907 bonds, with interest from May 1, 1881; principal, \$1,620,950; interest to July 1, 1881, \$19,070; and 550 with interest from November 1, 1881, to April 1, 1882; principal, \$467,500; interest, \$13,750.

“The precise date or dates at which the purchase of the 3,407 bonds is claimed by plaintiff to have been made is not very clearly defined. Plaintiff in his origi-

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nal complaint fixes May 1, 1881, as the date of the purchase of 3,307 of the bonds, and leaves the date of purchase of the remaining 100 bonds indefinite. In his amended complaint the date of the purchase of the entire amount is left indefinite. His testimony on the trial is far from clear or consistent on the question of the precise time or times at which he claims the purchase to be made. On the oral summing up before me, counsel for plaintiff, in his able and forcible and ingenious argument, fixed the date of the purchase of the entire amount as June 1, 1881. In the requests to find, submitted to me on behalf of plaintiff, it is claimed that Garrison purchased 1,500 of the bonds on May 1, and 1,907 on June 1, 1881 (29th proposed finding of fact).

“On consideration, however, of the whole evidence in the case, I am constrained to find that plaintiff has failed to prove the alleged purchase on any of these dates or at any other time. I am not unmindful of the ingenious and plausible argument of the learned counsel for the plaintiff, based on the delivery to Garrison of the proportion of stock to which he would have been entitled under the agreement of December 17, 1880, upon a purchase of the entire amount of bonds. There is very great force in this argument, although the inference drawn by plaintiff's counsel from the coincidence in the amount of the stock received, with the amount of the bonus on the entire issue of bonds, 3,500, is much weakened when it is remembered that of these 3,500, eighty-four were not subject to the contract of December 17, 1880, being bonds belonging to the company, as I have heretofore pointed out, and 100 were then in the possession of William Walter Phelps, and were not in fact redeemed until the following October. The proper inference, it seems to me, to be drawn from this transaction, is that Garrison wished to have in his hands, subject to his own control, certificates representing a sufficient number of shares of stock to cover the bonus

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that he would be entitled to if he should thereafter purchase or sell to other parties the entire issue of bonds at eighty-five cents on the dollar.

“Nor am I unmindful of the testimony of the witnesses called by plaintiff as to admissions made by Garrison as to his ownership of the bonds. This testimony is entitled to much weight, but it does not seem to me to be convincing. Recollection of conversations is always uncertain, and the precise language used is seldom capable of exact reproduction. Besides, at the time of the conversations, Garrison did own most of the bonds and held all but ten of them, and he might well have used general language in speaking of the matter without meaning to be literally understood as the owner of all the bonds.

“The question seems to be too important to be decided upon mere admissions, especially as Garrison himself died before the time arrived for defendants’ testimony, and was, therefore, not able to give his version of these conversations.

“The conduct of the parties, subsequent to the alleged purchase of the bonds, seems to me absolutely inconsistent with plaintiff’s present contention. Plaintiff himself at no time claimed in his dealings or in his correspondence with Garrison to have sold the bonds to Garrison or to be entitled to their purchase price. There is no documentary evidence either in the voluminous correspondence between the parties or elsewhere, of such a claim on plaintiff’s part or of any admission of such a fact on Garrison’s part. The various instruments executed by plaintiff from time to time treat the bonds as belonging to him, and as held by Garrison as collateral security for his loans or advances. There is not even any evidence that plaintiff was aware that Garrison had charged himself on his books as purchaser of the 2,457 bonds which defendants admit to have been purchased. I do not deem it necessary to analyze in detail the evi-

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dence on this branch of the case. Suffice it to say, that I concur in the main with the conclusion of the former referee on this point.

“Included in the 2,457 bonds credited by Garrison to plaintiff on his books at 85, were 100 bonds which Garrison, about October 3, 1881, had redeemed from William Walter Phelps, and which Griggs had previously pledged with Phelps for a loan. Garrison paid to Phelps the sum of \$32,400 to redeem these bonds, and charged plaintiff with that amount on his books. The numbers of the Phelps bonds were 101 to 200, both inclusive. The numbers of the bonds for which Garrison gave Griggs credit on October 31, 1881 (1,907 bonds), were Nos. 87 to 398 and 406 to 2,000, thus including the Phelps bonds.

“It follows that of the 3,407 bonds received by Garrison as above stated, 950 were not purchased by him under the contract of December 17, 1880, but were held by him as collateral, unless he acquired absolute title thereto by the papers executed by plaintiff, which will be hereafter more particularly referred to.

“In addition to these bonds, Garrison obtained 83 by a purchase, which I agree with the former referee in holding was a purchase from the company and has properly no place in this accounting. These 83 bonds were all but one of the 84 bonds which were reserved by the company under the tenth clause of the contract, and constituted no part of the bonds coming to Griggs under the contract. On January 8, 1881, the president of the company, Mr. Mack, gave plaintiff a letter authorizing him to sell the 84 bonds belonging to the company at 75 cents on the dollar, accounting to him, Mack, for the proceeds of sale of the same; and subsequently, and on the 6th day of December, 1881, an account was stated between plaintiff and the company, in which he debited himself with the proceeds of the 84 bonds at 75 and credited himself with various payments for account of

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the company, the account showing a small balance in his favor. One of the bonds was sold by the plaintiff to some person other than Garrison; the other 83 were sold to Garrison, together with stock to the amount of thirty per cent. of the face of the bonds, the price payable by Garrison for the bonds and stock being 77½ per cent. of the face value. Credits were given to plaintiff by Garrison in his journal and ledger for the amount, the credits, appearing on the ledger account under date of January 15, 1881, \$54,250, and December 12, 1881, \$10,075. This transaction amounted to a direct purchase of the bonds from Griggs, the latter accounting to the company for the proceeds. The debits and credits for these bonds must come out of this account on both sides.

“ I now proceed to discuss the question of Garrison’s rights and liabilities as to the 950 first mortgage bonds received by him as collateral and not purchased under the agreement of December 17, 1880.

“ On the 15th of March, 1882, a paper was signed by plaintiff, purporting to be an absolute transfer to Garrison of all his right, title and interest in the first mortgage bonds of the railroad ‘ amounting to \$3,500,000 (except \$10,000 which are not owned by me); said bonds are now in the possession of said Garrison, and held by him as collateral for loans made to me, and by this instrument I hereby sell, assign and transfer to him any interest I have, or may have in said bonds, or in any of them, over and above said loans.’

“ If this instrument is to be given its natural and legal effect, it operates as a clear release to Garrison of plaintiff’s equity of redemption in the bonds held by Garrison as pledgee. Is there any reason why it should not be given its natural and legal effect?

“ Plaintiff has taken several inconsistent positions as to this instrument. He has claimed, through his counsel, that it was intended to be absolute and was confirmatory

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of the sale previously effected on or about June 1, 1881, of the entire amount of bonds at eighty-five cents on the dollar. He has also claimed, in his testimony, that it was intended to be absolute, but was executed by him under coercion, by reason of threats made by Garrison, unless it were executed, to refuse further advances and to foreclose the road. He has also claimed that it was intended to be absolute, but was, in consideration of an agreement by Garrison, to furnish money to build the road to Wheeling. He also claims, by his counsel, that it was not intended to be absolute, but as additional collateral security.

“As I have arrived at the conclusion, as heretofore stated, that Garrison did not purchase the entire amount of bonds, I cannot adopt the theory that this instrument was confirmatory of such purchase.

“Nor can I adopt the theory of coercion. I do not find sufficient evidence of what would amount to duress either in law or equity.

“In determining what constitutes duress, equity adopts the legal definition and rules. *Miller v. Miller*, 68 *Pa. St.*, 486; *McLin v. Marshall*, 1 *Heisk.*, 678. Lawful arrest or imprisonment, or prosecution of the party himself, or threats of such lawful arrest, imprisonment, prosecution or litigation directed against the party himself, do not constitute duress; the same is true of many other species of threats.’ 2 *Pomeroy’s Equity Jur.*, § 950, note 2.

“A threat to refuse to carry out an executory contract or to exercise a legal right to foreclose does not constitute duress within any of the authorities that I am aware of. Assuming the threat to have been made as claimed by plaintiff, it was a threat to advance no further moneys and to foreclose on his bonds. Garrison was either bound by an executory contract to advance such moneys or he was not. If he was so bound, then a threat to violate his executory contract cannot be considered coercion, as plaintiff had a complete remedy at

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law for such violation. If he was not so bound, there can be no duress in insisting upon his legal rights.

“ Plaintiff was of full age and in full possession of his faculties. He cannot be heard to repudiate his own formal and deliberate acts because of threats on the part of Garrison. Plaintiff was under no duress either of body or goods.

“ Nor do I find any sufficient evidence of an agreement on the part of Garrison to furnish moneys to complete the road to Wheeling in consideration of this transfer and the contemporaneous transfer of stock. Plaintiff’s testimony is not sufficiently clear, precise or consistent to satisfy my mind that any such agreement was, in fact, made. I concur with the former referee in his conclusions as to this question.

“ It remains to consider whether this instrument is to be treated as absolute or collateral.

“ I was at first inclined to hold that it should be treated as an absolute transfer. It appears that at that date Garrison had advanced a very considerable sum over and above the purchase price of the bonds purchased by him, and he may well have thought that the purchase at 85 was a questionable investment, and that he was entitled to whatever profit he might make on the remaining bonds as compensation for the risks he had incurred and was about to incur in furnishing funds for the enterprise.

“ There was, therefore, a sufficient reason on Garrison’s part for demanding and on Grigg’s part for conceding an absolute transfer of the latter’s equity in the bonds.

“ Further reflection and examination of the evidence on this branch of the case and further examination of the authorities have, however, shaken my first conclusion, and after hearing counsel for both sides again on this point, I have been convinced that the instrument under consideration was not understood or intended, nor can it be regarded in a court of equity, as an absolute trans-

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fer, but as additional collateral security. It is quite true that the instrument of December 17, 1880, would seem to have transferred all the bonds as collateral, but it was in terms limited to the loan of \$40,000 therein referred to, and it may have been thought necessary or desirable to make a new instrument which should cover all past and future loans. With regard to this transaction, as with regard to many other transactions between these parties, it is difficult to arrive at a conclusion which is absolutely free from doubt. The instruments executed by the parties seem to be at variance with the theories of both sides. The oral evidence is unsatisfactory and inconclusive. The plaintiff's testimony is to be received with caution, owing to his interest in the controversy and the death of his adversary and the principal witnesses of his adversary, William R. Garrison and the bookkeeper Ward. There is practically no evidence for the defendants on the main issues of the case, the deposition of Commodore Garrison having been taken before this suit was commenced and at a time when it appears he was physically, if not mentally, shattered, and being very general and vague in its statements and throwing but little light on the questions in controversy. Under these circumstances, the conduct of the parties, the documentary evidence, the correspondence and the accounts, are the most reliable sources from which to draw conclusions as to the intent of the parties in their various transactions.

“Applying this test to the instrument of March 15, 1882, as to the bonds, we find that Garrison did not treat this instrument as altering his relations to plaintiff. On the 3d of April he credits plaintiff on his journal and ledger with 550 of the bonds at eighty-five cents on the dollar, with accrued interest since November 1, 1881, the date of the last interest day of the bonds. On the 8th of November, 1882, he takes a further assignment from plaintiff of all his interest under his contract, in-

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cluding in terms the bonds, thus implying that plaintiff still had an interest in the bonds.

“This conduct on the part of Garrison seems to me entirely inconsistent with any claim that the instrument of March 15, 1882, made Garrison the absolute owner of all the bonds.

“Defendants’ counsel ingeniously construes this instrument as meaning that to the extent of the then existing loans, Garrison was still to hold the bonds as collateral, crediting plaintiff up to the amount of such loans with any bonds he might take or sell at the agreed price of eighty-five cents on the dollar, all above that amount belonging to Garrison absolutely. I cannot, however, adopt this view of the instrument. It seems to me it must either be taken as an absolute assignment of all plaintiff’s interest over and above his then existing loans or as merely collateral. If the former construction be adopted, it would necessarily follow that no accounting could be demanded by plaintiff for any of the bonds other than those already purchased at eighty-five, since they were either worth less than the amount of the loans or more. If worth less, there was, of course, no equity whatever in plaintiff. If worth more, the equity would be released absolutely by the instrument. If the latter construction (that of collateral security) be adopted, the relations of the parties remained precisely as before.

“The rule is elementary in courts of equity and is well settled in the jurisprudence of this State, that a transfer or conveyance of property, though absolute on its face, may be shown to have been intended and understood by the parties as collateral security, and the fact that the relation of debtor and creditor exists between the parties, and that loans are made contemporaneously with or subsequently to the execution of the instrument is strong evidence that the instrument was intended as security for the loans and not as an absolute transfer. 1 *Jones on Mortgages*, §§ 282, 324, 325; 2 *Wharton*

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on *Evidence*, § 1032 ; *Horn v. Keteltas*, 46 *N. Y.*, 605.

“ A subsequent release of the equity of redemption will not of itself be conclusive, especially where the relation of debtor and creditor still exists and loans continue to be made.

“ Not only so, but even if the parties intend to have the instrument operate as an absolute release, there must be an adequate consideration to support it, or equity will disregard it.

“ ‘ The mortgagor may make a subsequent release of the equity of redemption, but an adequate consideration is necessary to support it. It must be for a consideration that would be deemed reasonable, if the transaction were between other parties.’ 1 *Jones on Mortgages*, § 340.

“ ‘ A transfer to a mortgagee of the equity of redemption by the mortgagor is ‘regarded with jealousy by courts of equity.’ It will be sustained only ‘when in all respects fair and for an adequate consideration.’ *Odell v. Motross*, 68 *N. Y.*, 504.

“ ‘ Contracts of that kind, made with the mortgagor to lessen or embarrass the right of redemption, are regarded with jealousy, as they are very apt to take their rise in unconscientious advantages assumed over the necessities of the mortgagor.’ 1 *Vern.*, 8 ; 2 *Ib.*, 520 ; 2 *Atk.*, 495 ; 2 *Ball & Beatty*, 278.

“ ‘ The general principle is, ‘once a mortgage, always a mortgage ;’ and though, no doubt, the equity of redemption may be released on fair terms, yet the fairness and value must distinctly appear.’ *Holridge v. Gillespie*, 2 *Johns. Ch.*, 34.

“ ‘ A subsequent release of the equity of redemption may, undoubtedly, be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor’s interest. The transaction will, however, be closely scrutinized, so as to prevent any oppression of the debtor. \* \* \* The

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release must also be for an adequate consideration.' *Peugh v. Davis*, 96 *U. S.*, 332.

"Even, therefore, if the parties had intended this instrument as an absolute transfer of the equity of redemption of the bonds, equity would disregard such intent unless supported by an adequate consideration.

"There was no consideration for this instrument, unless it be an agreement on the part of Garrison to make further advances, and this of itself would lead a court of equity to construe the agreement as collateral and not absolute.

"Tested, then, by the authorities as well as by the conduct of the parties, I conclude that this paper of March 15, 1882, is to be treated not as an absolute transfer, but as merely further collateral security for future advances.

"Similar reasons lead to the same conclusions as to the instrument of November 8, 1882. There seems to be the same absence of adequate consideration for this instrument as there was for the instrument of March 15th. No release or discharge of indebtedness took place, no rest was made in the account between the parties, and substantially no change of situation took place. I concur with the former referee in holding that this instrument cannot be regarded as an absolute transfer of title. The evidence shows that at the time of its execution there were negotiations pending for the sale of the entire Wheeling and Lake Erie enterprise to a so-called Vanderbilt syndicate, owning the South Pennsylvania Railroad. The paper executed by the plaintiff on the 8th of November, 1882, appears to have been intended to clothe Garrison with the apparent legal title to the bonds, stock, contract and other property covered thereby for the purpose of facilitating the negotiations and enabling him to make a transfer of title to the South Pennsylvania people if the negotiations should result in an agreement. I am of opinion that, notwithstanding

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this instrument, the relations of the parties remained as before, Garrison holding as pledgee such of the bonds and stock as had not theretofore been purchased by him or transferred to him absolutely under the instruments of December 17, 1880, and September 24, 1881.

“Defendants’ counsel claim that this instrument is to be taken for what it purports to be—an absolute transfer of title. It is claimed that plaintiff had made false representations to Garrison with regard to the probable cost of the road and with regard to the amount of subsidies and subscriptions, and that Garrison had been deceived and defrauded in other material respects, and that he insisted, at this stage of the matter, on becoming virtually the absolute owner of the entire enterprise, and that this was acquiesced in by the plaintiff. The difficulty, however, with this theory is that it lacks evidence to support it, and I am not prepared to follow the learned counsel for the defendants in their endeavors to supply this lack of evidence by ingenious and plausible theories. The fact remains that Garrison continued his account with Griggs upon his ledger exactly as before; the amounts paid by Garrison were charged as advances to Griggs thereafter as they had been theretofore; there was no rest in the account, nor any change whatever in the methods of dealing between the parties. The theory of the defendants’ counsel that Garrison kept the account on his ledger open for the purpose of showing the net profit or loss of the enterprise, intending ultimately if he should realize a profit out of this transaction taken in connection with the associated matters of the Cleveland and Marietta Railroad Co. and the Wheeling and Lake Erie Bridge Co., to give plaintiff the benefit of a share of such profit, is again a theory quite without sufficient evidence to support it.

“In April, 1883, a settlement was had between the plaintiff and the Wheeling and Lake Erie Railroad Company under his contract with the company for the

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entire second and third divisions of the railroad, the road having been constructed from Huron to Zoar or Valley Junction on the second division, and from Norwalk to Toledo on the third division. The road from Zoar or Valley Junction to Bowerstown had not been completed, nor had the first division from Bowerstown to Wheeling been built.

“Plaintiff claims that the terms of this settlement were in effect dictated by Garrison, and were intended to be in furtherance of the scheme (then still pending, as plaintiff contends) for a transfer of the entire Wheeling and Lake Erie enterprise to the South Pennsylvania parties. I am unable, however, to take this view of the transaction. On the contrary, I am of the opinion that the settlement was made by the plaintiff voluntarily, and that he is bound thereby.

“The legal result of this settlement, in my opinion, was that plaintiff turned over to the railroad company the second and third divisions of the road and liquidated his claim to stock and bonds upon those divisions on the basis of 190 miles under his contract.

“Subsequently the road was completed from Zoar or Valley Junction to Bowerstown by Garrison or his representatives; but it did not earn enough to pay operating expenses and interest on the first mortgage bonds; and during the first trial of this suit foreclosure proceedings were instituted, the road was sold and a reorganization scheme was carried through, by which a new company was formed under the name of the Wheeling and Lake Erie Railway Company, which purchased the property of the old company and issued new bonds and stock.

“By the terms of the reorganization the holder of each of the first mortgage bonds then outstanding of the Wheeling and Lake Erie Railroad Company became entitled to bonds of the new company at the rate of three of the new bonds for four of the old, and also ten

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shares of the stock of the new company of the par value of \$100 each, for each bond of the old company, upon paying \$3 a share for the stock. Two coupons of the old bonds at \$30 each were also refunded into first mortgage bonds of the new company at the rate of seventy-five cents on the dollar of the par of the old coupons; that is to say, \$3,000 of the new bonds for \$4,000 of old coupons, and also ten shares of stock upon payment of \$3 per share for each \$1,000 of coupons. At the time of the reorganization 2,850 of the first mortgage bonds of the old road were considered as outstanding, this being the entire amount that had then been earned under the construction contract, including the 84 bonds sold by the company direct as above set forth, the balance, 650, being surrendered as unearned and treated as unissued. As to the propriety of this surrender, there seems to be no room for serious question. Of course, as between the company and the contractor or his assigns the bonds had been delivered merely as an advance upon the contract, and if not earned the company was clearly entitled to have them surrendered unless they had come into the hands of a *bona fide* purchaser for value. Of this amount of 2,850, ten had never passed through Garrison's hands, having been sold by the plaintiff or the railroad company. Eighty-three of the bonds had been purchased by Garrison at 77½ cents, together with some bonus stock directly from Griggs as the representative of the company, as appears by a foregoing portion of this opinion. Deducting the 93 bonds, we have 2,757. Of this number 2,457 had been purchased by Garrison from the plaintiff at 85 cents on the dollar under his contract of December 17, 1880, leaving 300 to be accounted for. This 300 appears to be the same number of bonds that was reserved under the settlement of April, 1883, for the completion of the second division from Zoar to Bowerstown. I see no escape from the conclusion that

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for these 300 bonds Garrison's estate must account to the plaintiff under the ordinary rules applicable to the relation of pledgor and pledgee. By the instruments of December 17, 1880, and November 8, 1882, Garrison became the pledgee of the contract as well as of the bonds and stock. No steps were ever taken to foreclose Griggs' interest in that contract; no release on any new or adequate consideration was ever obtained from Griggs of his interest. The settlement made with the railroad company for the second and third divisions of the road, in April, 1883, recognized Griggs' interest as contractor as still existing. The accounts kept by Garrison and his representatives after that date recognized Griggs as still a debtor for moneys paid from time to time on account of construction of the road. Under these circumstances, it seems to me, that the defendants must be held to have completed the construction of the road to Bowerstown as pledgees of the contract, and for the benefit of themselves as pledgees and of the plaintiff as pledgor, and that the plaintiff is entitled upon an accounting to recover from the defendants whatever they have received upon the bonds or stock earned under the construction contract over and above the amount of the plaintiff's advances.

"It follows from the foregoing views that the defendants must account to Griggs for the proceeds of the first mortgage bonds and stock of the new company, which they received in exchange for the 300 bonds of the old company and the coupons belonging thereto.

"On this theory plaintiff must, of course, remain charged with the amounts expended for construction after April, 1883, upon this portion of the road.

"In determining the amount for which defendants are chargeable, the rules of equity entitle the plaintiff to elect to treat the bonds and stock last disposed of as his bonds and stock, if that be to his advantage, there having been no notice of sale given to him, and there being

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no mode of distinguishing his securities from those of the defendants. This is the ordinary rule applied to cases of confusion of goods. *Brantly on Personal Property*, § 170.

“The principle is thus stated by Chancellor KENT in *Hart v. Ten Eyck*, 2 *Johns. Ch.*, 108: ‘The rule of law and equity is strict and severe on such occasions. If a party having charge of the property of others so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it. If it be a case of damages, damages are given to the utmost value that the article will bear.’ *Armory v. Dalamirie* 1 *Str.*, 505; *Lupton v. White*, 15 *Vesey*, 432; 2 *Vesey & Beame*, 265.

“The learned chancellor further held that the injured party might elect which particular part of the mingled property he would claim as his own.

“The amount with which defendants are chargeable as the proceeds of the bonds and stock of the new company received in exchange for the 300 old bonds and coupons I find to be \$360,135, with interest from April 13, 1887.

“The next branch of this case calling for consideration is that relating to the rights of the parties with regard to the capital stock of the railroad company. The views I have thus far announced with regard to the papers of March 15, 1882, and November 8, 1882, with reference to the bonds, apply equally, of course, to the other paper of March 15, 1882, relative to stock and to that portion of the paper of November, 8, 1882, which refers to stock. I am of opinion that the shares of stock transferred by those two papers were held by Garrison and his representatives as collateral security up to the time of the foreclosure and reorganization of the road. By the foreclosure, of course, the stock of the

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old company was wiped out and became worthless, except that the reorganization scheme provided that the stockholders of the old company might, by paying a certain amount in cash, receive stock of the new company. There is no evidence that the foreclosure proceedings were not begun and prosecuted in good faith. They were open and notorious and must have been known to the plaintiff. Indeed, he does not claim to have been ignorant of them during their progress. He made no offer to pay the cash assessment on his stock, nor did he make any request of defendants to pay the assessment on the stock held by them as collateral, nor do I think that as matter of law defendants would have been bound, if requested, to make any such payment. The duty of a pledgee is merely to preserve the pledge and to take such legal steps as may be necessary to prevent loss. He is not obliged to advance money out of his own pocket for the benefit of the owner of the pledged property under circumstances such as these. To so hold would be to impose a most onerous obligation upon the pledgee of corporate stock. As a matter of fact, the defendants did not pay any assessment upon their own stock or on the plaintiff's stock, and the same ceased to exist for all practical purposes and became absolutely worthless. Hence, plaintiff is not entitled to any relief in this suit based upon the stock transferred by him to Garrison as collateral.

“It is strenuously claimed, however, by plaintiff that Garrison agreed to complete the road to Wheeling; that if so completed the road would have been a profitable concern; and that defendants are liable in damages for breach for this agreement. It is contended that plaintiff is entitled to be credited also with the ten per cent. contractor's profits which he would have made on the entire road if completed to Wheeling in accordance with the alleged agreement of Garrison so to do.

“I fail, however, to find sufficient evidence to justify

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me in finding as a fact that Garrison ever made any such agreement. Plaintiff's own testimony is very inconclusive on this point; his statements are indefinite and by no means entirely consistent with each other as to the time when or the terms in which any such agreement was made, and the matter is too important to be determined in plaintiff's favor upon any but the clearest evidence, after Garrison himself is dead and therefore unable to testify. No documentary evidence is furnished nor any corroborating testimony sufficient to justify the imposing upon defendants of so onerous an obligation.

"The only remaining question of importance is as to the notes of the Wheeling and Lake Erie Railroad Company and the second mortgage bonds.

"These notes represented the amount of \$4,000 a mile, which the company was bound under its contract to contribute to the construction of the road, and also the contractor's profit of ten per cent. on the work of construction. The company was unable to pay these amounts in cash, and in lieu of cash payment gave their notes to Griggs for the same. Griggs received from Garrison the money needed for the work of construction as it progressed, including the cost of right of way and of bridging, grading and tieing, for which the company should have paid at the rate of \$4,000 a mile, and also a portion of the contractor's profits on the same. Griggs endorsed the notes of the company over to Garrison, and he held them as collateral security for his advances. The relation of the parties under these transactions seems to me a perfectly simple one. As Griggs could not obtain the money from the company, he advanced it himself, and subsequently took the notes of the company therefor. He from time to time borrowed the money from Garrison as he needed it for his advances to the company and endorsed over the notes to Garrison when received by him from the company. Griggs was

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thus a creditor of the company ; Garrison was a creditor of Griggs and held the company's notes as collateral.

“Plaintiff's counsel has contended very strenuously and with great force and plausibility that the notes of the company were for direct advances by Garrison to the company, and that the amounts represented thereby should, therefore, never have entered into the account with Griggs either as debits or credits. I cannot agree with his theory. It is inconsistent with the conduct of the parties, with plaintiff's pleadings and with the rulings of the general term.

“On May 1, 1883, the amount of the company's notes thus held by Garrison was \$1,949,710.72, and the interest thereon brought the amount up to \$2,062,643.12. Garrison thereupon, pursuant to an arrangement made on the 19th of April, took from the company 2,280 of its second mortgage bonds at seventy-five cents on the dollar in lieu of a corresponding amount of the face of the notes. The general term has held that this transaction amounted to a purchase by Garrison at seventy-five cents on the dollar of these second mortgage bonds and that to that extent the notes were canceled as existing obligations and to that extent plaintiff was entitled to a credit in his account with Garrison. Plaintiff must, therefore, be allowed an absolute credit of \$1,710,000, being the purchase price of the bonds at seventy-five per cent. of their face, and also must be allowed accrued interest on the bonds so purchased, namely, \$26,600, making a total of \$1,736,600, with the interest on this total from May 1, 1883.

“It remains to consider the rights of plaintiff as to the balance of the notes over and above this amount. It is not disputed that Garrison surrendered the notes to the company. It is not proved that plaintiff consented to such surrender. The general rule is that a creditor who surrenders a note of a third party held by him as collateral without the consent of the pledgor thereby

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discharges the debt owing to him by the pledgor to the extent of the face of the note so surrendered. *Garlick v. James*, 12 *Johns.*, 146; *Gage v. Punchard*, 6 *Daly*, 229; *Colebrooke on Collateral Securities*, § 96.

“In *Exeter Bank v. Gordon*, 8 *N. H.*, 66, where an unauthorized surrender was made of a collateral note by the pledgee upon a compromise with the maker, the court held that the pledgee was liable only for the amount of the compromise, it being shown that the maker of the note was insolvent. The court held that an unauthorized compromise and wrongful surrender of the note ought not to put the pledgee in a worse plight than if he had actually converted the note wrongfully to his own use, and in the latter case he would clearly be liable only for its value (see opinion of RICHARDSON, Ch. J., at p. 80).

“*Colebrooke on Collateral Securities* says (§ 96): ‘And cases may occur where a debt is not well secured and the pledgee may take less than is due and surrender the note. But this cannot be done where the debt is well secured,’ citing *Zeinpleman v. Veeder*, 98 *Ill.*, 613.

“There is, however, a manifest difference between a compromise of an uncollectible note and a surrender of such a note without any consideration received. In the latter case there is clearly an assumption of ownership which can by no possibility be shown to have benefited the pledgor.

“The authorities appear to hold that in such a case the pledgee elects to take the collateral note at the amount due upon its face, in satisfaction, to that extent, of the principal debt.

“It is quite true, as pointed out by defendants’ counsel, that in most, if not all, of the cases where this rule is applied, it was either proved or assumed that the maker of the note was solvent. It is also true that in the ordinary case of a conversion of a collateral note by a pledgee, the value of the note and not its face is the

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measure of damages, the face value being only the *prima facie* measure.

“But where, as in this case, there is evidence of an election to cancel the note and to look to the maker as debtor on open account for the amount, I am of opinion that such election brings the case within the rule above stated, even though the maker of the note be insolvent.

“The entries made upon Garrison’s books appear to show such election. He debits the face value of the notes to the Wheeling and Lake Erie Railroad Co. on his ledger account with the company, crediting the purchase price of the second mortgage bonds. This debit remained upon his books until his general assignment in June, 1884, and forms part of the \$801,934.57, which appears on the inventory of the assignee as ‘Open Account of Wheeling and Lake Erie R. R. Co.’ I am of opinion that he must be held to have chosen to look to the railroad company as his debtor for the amount of the notes surrendered above the purchase price of the second mortgage bonds, and to have thereby released to that extent the indebtedness of plaintiff to him.

“The rule laid down by the former referee, restricting the plaintiff to the actual damage sustained by the surrender, and fixing that damage by ascertaining the amount recoverable from stockholders other than Griggs under the constitution and laws of Ohio, while it would seem to be a just rule, and while in harmony with the general rule as to conversion of negotiable instruments, does not seem to me to be in accordance with the legal effect of Garrison’s acts as I find them set forth in the evidence and in Garrison’s books.

“It is to be borne in mind that at this time Garrison had not abandoned hope of making the enterprise successful. He contemplated the completion of the road to Bowerstown, which, of course, would involve the expenditure of a considerable sum and which, equally of course, he would not have undertaken had he not con-

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sidered it to be to his pecuniary interest. He also took a large number of the second mortgage bonds of the company which he evidently regarded as of some value. While, therefore, the notes of the company were at that time uncollectible, there was a possibility of the company ultimately being able to respond in some shape or form for the amount. Garrison may, therefore, have concluded that as Griggs was not in a position to repay him his advances and redeem the notes he might as well make the claim his own and look to the company for future reimbursement after the road should have been completed.

“What was done, while, perhaps, not strictly amounting to a novation, may be so regarded by a court of equity in view of the peculiar relations of the parties. Garrison was virtually the railroad company. He owned two-thirds of the stock and controlled the board of directors. He occupied a fiduciary relation to plaintiff as pledgee of the notes. By surrendering the notes to the company he, of course, extinguished all claim founded thereon. He thus, in effect, released plaintiff's claim against the company evidenced thereby. Simultaneously he debits the company with the amount as a debt to himself. The company must be assumed to have assented to this arrangement. The only element lacking to constitute a novation was the consent of plaintiff. By now coming in and ratifying and taking advantage of the transaction he gives his consent, which Garrison at the time, as his pledgee and trustee, undertook to give for him. We thus have a substantial novation by which plaintiff is discharged from his debt to Garrison to the extent that Garrison became the creditor of the railroad company upon open account upon the surrender and cancellation of the notes. See 1 *Parsons on Contracts*, 217.

The acceptance of the new for the original contract discharges the old debt, whether the new contract is

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ever performed or not. By accepting a third person in substitution for the original debtor the creditor assumes the risk of such person's insolvency. 1 *Parsons on Contracts* (7th ed.), 248, foot-note 1.

"It follows from the foregoing considerations that plaintiff is entitled to credit for the entire amount of the notes surrendered over and above the purchase price of the second mortgage bonds. The credit given to plaintiff by the former referee for 84 bonds at 85 cents on the dollar does not seem to me to be correct, as I understand the figures. I have allowed plaintiff 2,457 bonds at 85 cents on the dollar, which, deducted from 3,500, leaves 1,043. 83 bonds are to be taken out of the account altogether, having been purchased through Griggs from the company at 77½ cents on the dollar, leaving 960. Ten bonds were never received by Garrison, having been sold by Griggs or the company to other parties; 300 bonds have been credited to the plaintiff at the amount realized therefor through the reorganization scheme, and the remaining 650 bonds were surrendered to the company as unearned. I therefore disallow the amount of 84 bonds at 85 per cent. and accrued interest thereon.

"Restating the account in accordance with the foregoing conclusions, we have the following result:

The amount found due from plaintiff to defendants by the report of the former Referee, dated March 5, 1889, was.....		\$2,171,395 84
Charging back to plaintiff's debit the credits given him by the former Referee for 84 bonds at 85%.....		71,400 00
'Accrued interest from May 1, 1881'.....		33,605 60
Interest to date of former Report.....		36,821 96
We have a total debit of.....		\$2,313,223 40
The allowance made to plaintiff by the former Referee for the proceeds of the 300 bonds must be reduced from.....	363,712 50	
To.....	360,135 00	
A difference of.....	\$ 3,577 50	
Interest on this amount from April 13, 1887, to March 5, 1889.....	405 42	8, 982 92
Total Debits.....		<u>\$2,317,206 32</u>

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Supplemental Opinion of REFEREE.

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Against this are to be credited the following

Items :

2d Mortgage Bonds.....	\$ 1,736,600 00
Interest May 1, 1883, to March 5, 1889.....	608,967 72
Balance of notes.....	86,996 58
Interest.....	30,506 71

Total.....	\$2,463,071 01
Deducting the debits.....	2,317,206 32

We have as the net balance against the defendants, as of March 5, 1889.....\$ 145,864 69

“Plaintiff is entitled to judgment against defendants for this amount, with interest and costs. In computing the interest, however, in order to be entirely accurate and to avoid compounding, it will be necessary to recalculate interest on the several items to the date of my report.

“Counsel for the plaintiff will prepare an account in accordance with the foregoing conclusions. Both parties may submit requests to find on or before December 5th, 1891.”

WILLIAM B. HORNBLOWER, Referee.—Supplemental Opinion.—“A memorandum has been submitted to me on behalf of the defendants in connection with the requests to find which seems to call for some expression of opinion on my part. Defendants’ counsel calls attention to authorities to the effect that where a party introduces in evidence entries from books of account of his adversary, he thereby makes the books evidence not only in his favor but against him. There is no doubt about this rule of law, and defendants are entitled to the benefit of any entries in the books of Garrison by way of counter-charge against the entries introduced in evidence by the plaintiff. The effect, however, of the evidence, is quite another thing. The entries are certainly not conclusive against either party. My attention is particularly called to the entry in Garrison’s books pur-

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Supplemental Opinion of REFEREE.

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porting to show a purchase of the company's notes from Griggs at seventy-five cents on the dollar, and it is strenuously urged that plaintiff is bound by this entry, having introduced the account in evidence. I do not so understand the rule. I am, however, concluded on this subject by the opinion of the general term in this case, where Judge SEDGWICK, delivering the opinion of the majority of the court, after adverting to the entry in Garrison's books showing a credit to Griggs of seventy-five per cent. of the face value of the notes, says: 'While I think that at least the plaintiff was entitled to be credited in the accounting before the referee with the amount of the first credit and interest to the date of the accounting, I also am convinced that the testimony incontrovertibly showed that the plaintiff was entitled to a larger credit. In my opinion the resolution and the subsequent facts show a purchase by Garrison of 2,280 second mortgage bonds for his own benefit, and not as a substitute for the notes at seventy-five cents on the dollar. \* \* \* Upon actual delivery for the bonds, they became extinguished for Garrison's benefit in the result to the value of the money that Garrison would otherwise have owed the company for the bonds. To the extent the collateral security was extinguished, the original indebtedness for which the security had been given was extinguished, and for this reason the plaintiff should have had on the accounting a credit of 75 per cent. on the par value of the bonds, or, if my calculation be correct, \$1,710,000 and interest from May 1, 1883. The transaction is the same as if the plaintiff had received as collateral for (the payment of) his advances for the company bonds of the company, and had then sold them to Garrison at seventy-five cents on the dollar with consent of the company.' In view of this explicit ruling by the general term, I do not see how this matter is open to any further question before me. The only question that I have considered as open with

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Opinion PER CURIAM.

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regard to the notes is as to the balance over and above this amount, and it is as to this balance that I have considered the testimony and have drawn conclusions from the entries in Garrison's books. These entries are not in the account with Griggs, but in the account with the railroad company, and I have followed them literally.

"Defendants' counsel also urges that plaintiff having elected to treat the entire issue of first mortgage bonds as sold at 85, must be held to such election, and cannot recover more than 85 for any of the bonds on the theory of a pledge. This would undoubtedly be true if plaintiff's election had been acquiesced in by the defendant. If so acquiesced in, however, it would have to be acquiesced in as a whole and not in part. Plaintiff's contention is that the entire issue of bonds was purchased at 85 cents on the dollar, and that plaintiff is entitled to an absolute credit for that entire amount, irrespective of the subsequent transactions. This is disputed by the defendants, and I have decided in defendants' favor on this point. Having so decided, it became necessary to ascertain what the real relations of the parties were to the bonds, and I concluded that the relations were those of pledgor and pledgee, and my decision is based on this theory. Having accepted defendants' theory of the bond transaction, I do not see how plaintiff can be held bound by any election which has not been accepted by the defendants nor by the referee."

*John H. Post*, attorney, and *Robert G. Ingersoll* and *Calvin Frost* of counsel, for plaintiff.

*William R. Bronk*, attorney, and *Melville C. Day* of counsel, for defendants.

PER CURIAM.—At the beginning of the last trial the attorneys of the parties stipulated that the evidence

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Statement of the Case.

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introduced upon the former trial as printed in the case upon the former appeal, should be the evidence of the parties upon the new trial. By the stipulation all objections and exceptions to the admission or exclusion of evidence, as the same appeared in said case, were waived, and no exceptions to the admission or exclusion of evidence were taken by either party upon the new trial.

The evidence thus submitted supports the findings of fact made by the referee and these findings fully sustain the conclusions of law based by the referee thereon. The referee seems to have given proper effect to the rulings made by the general term of this court on the former appeal so far as they are applicable, and upon the whole case no exception appears on either side which calls for a reversal or modification of the judgment.

Upon the appeals of both parties the judgment should be affirmed upon the opinion and supplemental opinion filed by the referee, but without costs to either party.

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MARY COLLINS, APPELLANT v. THE LONG ISLAND  
RAILROAD COMPANY, RESPONDENT.

*Negligence ; contributory and when the joint negligence of the defendant  
and another party other than the plaintiff.*

In this case the controlling question before the court and jury was whether the accident was caused by the negligence of Burke, the driver of the carriage, or the negligence of the railroad company. The negligence of the driver could not be imputed to the plaintiff. From the facts in evidence in the case the jury might have found that the driver and the railroad company were both negligent, but the question of their joint negligence was not sent to or placed before the jury, and the plaintiff did not have the benefit of the finding of the jury whether each was partly negligent, and, therefore, both jointly negligent, and for this reason a new trial was ordered.

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Appellant's points.

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Before SEDGWICK, Ch. J., and FREEDMAN, J.

*Decided May 2, 1892.*

Appeal by plaintiff from judgment entered for defendant on the verdict of a jury, and from an order denying the motion of plaintiff for a new trial upon the judge's minutes.

*Frederick G. Gedney*, attorney, and *Edward C. James* of counsel, for appellant, argued:—

I. Defendant's negligence the only issue. It was conceded that the negligence of the driver, if any, could not be imputed to the plaintiff. The law is well settled to that effect, where the driver is not the servant of the plaintiff. *Robinson v. Railroad Co.*, 66 *N. Y.*, 10; *Dyer v. Railroad Co.*, 71 *Ib.*, 228, 234; *Bicknell v. Railroad Co.*, 120 *Ib.*, 290, 293; *Phillips v. Railroad Co.*, 127 *Ib.*, 560, 657; *Railroad Co. v. Markins*, 14 *Lawyers' Rep. Ann.*, 281. There was no evidence that the plaintiff was guilty of any contributory negligence. She was inside a closed carriage, powerless to control the driver, or to avoid or escape a collision. *Bicknell v. Railroad Co.*, 120 *N. Y.*, 290, 293. The defendant's claim was that the collision was wholly due to the negligence of the driver. The plaintiff's claim was that the defendant's negligence also contributed. The negligence on the part of the defendant consisted in not giving proper warning by flag, bell, whistle or otherwise of the approaching train, and in stopping the horses upon the track until it was too late to avoid the collision, when, if let alone, they would have got safely over.

II. Plaintiff not liable for driver's negligence. Notwithstanding the well-settled rule of law that a plaintiff, inside a closed carriage, is not liable for the driver's negligence, where the driver is not her servant, and in

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Appellant's points.

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spite of defendant's concession, in this case, that any negligence of the driver was not imputable to the plaintiff, the court flatly refused to charge at plaintiff's request, that the plaintiff was not responsible for the acts or negligence of the driver. To this the plaintiff excepted. This took away the effect of the defendant's concession made while the case was being summed up. It was equivalent to telling the jury that the negligence of the driver, if any, was imputable to the plaintiff. The plaintiff was entitled to the instruction requested, and its refusal was error.

III. Defendant's negligence not excused by driver's negligence. The court instructed the jury that, in order for the plaintiff to recover, they must be satisfied that the injuries complained of were occasioned by the exclusive negligence of the defendant. The plaintiff duly excepted to this portion of the charge, and requested the court to charge that, if the defendant, or its servants, were guilty of negligence which contributed to cause the accident, then it was no defence to the defendant that the driver was also guilty of negligence. The court refused so to charge, and plaintiff duly excepted. This was a serious error. It ignores the separate liability of several wrong-doers who contribute to a common injury. It does not exonerate the defendant for its share in the catastrophe, that the driver, or any other third party, for whose conduct the plaintiff was not responsible, also helped to bring about the injury. One wrong never excuses another. *Robinson v. Railroad Co.*, 66 *N. Y.*, 10, 13; *Ellis v. Railroad Co.*, 95 *Id.*, 546, 553; *Phillips v. Railroad Co.*, 127 *Id.*, 657. This charge, in effect, told the jury that if the plaintiff's injury was only in part due to the defendant's negligence, the defendant was not liable. On the same principle, if it was only in part due to the driver's negligence, the driver, or his employer, were not liable. So that, if the two contributed to bring about the injury, there would

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Appellant's points.

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be no liability, while, if either had done it exclusively, the plaintiff could recover from the exclusive wrong-doer. A proposition so obviously erroneous and absurd does not require argument. Under this charge the jury were bound to find for the defendant, if they concluded that the driver was in any degree negligent. This error entitles the plaintiff to a new trial.

IV. The defendant's duty to give warning. The court, at the defendant's request, instructed the jury that there is no statutory obligation upon the defendants to ring the bell or blow the whistle, or provide a flag-man at the crossing. The court so charged, and plaintiff duly excepted. The plaintiff requested the court to charge that it was the duty of the defendant to give timely warning of the approach of its train to the crossing in question, and if it failed to do so, and such failure contributed to produce this accident, the defendant may be held liable. The court refused so to charge, and plaintiff duly excepted. At the time this accident occurred, the statutory requirements as to ringing the locomotive's bell and blowing the whistle on approaching highway crossings seems to have been repealed. *Lewis v. Railroad Co.*, 123 *N. Y.*, 496. But such repeal simply relieved the defendant of the rule making it negligence *per se* to omit the statutory signals. It did not do away with its common law duty to use due care in approaching the crossings, and give timely warnings to prevent injury to passers on the highway. It was long ago decided that it was not enough, in all cases, even that the statutory signals were given. *Dyer v. Railroad Co.*, 71 *N. Y.*, 228, 230-1. In cases where the statutory signals were not required, it was always a question for the jury whether the defendant had exercised due care to give timely warning. *Swift v. Railroad Co.*, 123 *N. Y.*, 645, 649; *Austen v. Railroad Co.*, 39 *State Rep.*, 76. But here the court not only told the jury that the defendant was under no statutory obligation,

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Appellant's points.

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but refused to instruct them as to the defendant's common law duty. Under such a charge the jury had the right to infer that the omission of all signals was no longer to be considered negligence. The refusal of the instruction requested entitles the plaintiff to a new trial.

V. As to the flagman's stopping the horses. The plaintiff requested the court to charge, that if the jury found that the flagman stopped the horses upon the track in front of the approaching train, and that the carriage could have passed in safety, except for the act of the flagman in stopping the horses, then the defendant may be held liable. The court refused so to charge, saying: "The second proposition I decline to charge upon the ground that I cannot charge in its absolute terms, that the proposition depends upon circumstances and conditions not covered by it." The plaintiff duly excepted. What "circumstances and conditions" the court intended by its remarks it did not explain. The evidence upon the part of the plaintiff was that the flagman grabbed the team after the horses were on the track, and held them fifteen or twenty seconds, notwithstanding the driver's remonstrances. He then let go, but just too late to avoid the collision, as the locomotive struck the off hind wheel. The evidence on the part of the defendant was that the flagman took the horses' heads or lines, while they were crossing the tracks. The plaintiff had the right to have the jury instructed as requested. The request was completely within the evidence on the part of the plaintiff, and was conditioned upon the jury finding that the flagman stopped the horses upon the track in front of the approaching train, and that the carriage could have passed in safety except for the act of the flagman in stopping the horses. It makes no difference how careless the driver was in attempting to cross this railroad track in front of the train, or whether the signals were given by the defendant's servants, or heard or seen by the driver, if there

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Respondent's points.

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was time to cross the track in front of this train without a collision, and the successful crossing was prevented by the defendant's flagman holding the horses upon the track until the collision was inevitable. In such a case, the defendant is responsible to the inmates of the carriage, who were in no way chargeable with the driver's alleged negligence. The principle upon which such liability depends is clear in reason and in law. If the driver put the plaintiff in a situation of peril, the flagman prevented the opportunity for escape. Except for his reckless interference the driver's alleged negligence would have been without injury to the plaintiff. It was error to refuse the instruction requested, which entitles plaintiff to a new trial.

*E. B. Hinsdale*, attorney and of counsel, for respondent, argued:—

I. The decision of the jury was correct and in accordance with the overwhelming weight of evidence. The plaintiff produced the driver who was injured in the collision and who had the strongest motives possible to shift the responsibility for so gross a piece of negligence from his shoulders. His story is improbable and unreasonable. He admits that he was familiar with the crossing and that he was driving at a fast gait and on to the crossing in broad daylight. To corroborate his version in part, three boys were produced who were fishing in a pond by the side of the track who all admitted that they were not paying very close attention to the accident. The defendant produced eight adults who were in different positions, only one of whom was an employee of the railroad who testified that the driver drove rapidly toward the track, that the flagman was on the crossing while he was a considerable distance from the crossing, signaling to him and calling out to him not to proceed, and that the driver disregarded the warnings and drove rapidly on the crossing just in advance of the train.

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The most casual reading of the testimony and examination of the maps and photographs would convince the most prejudiced mind that the verdict of the jury was correct. There is no room for criticism or doubt as to this matter.

II. Plaintiff's exceptions to the charge and to the court's refusals to charge were not well taken. *First*: The refusal to charge the first request of plaintiff was not error, and the exception to the charge made at request of defendant was not well taken. At the time of this accident, September, 1889, there was no statutory obligation to give signals. (Lewis v. N. Y., L. E. & W. R. R. Co., 123 N. Y., 496.) And so far as the alleged absence of signals might, under all the circumstances, have been treated by the jury as evidence of want of reasonable care proportionate to the danger, the question was fully and fairly submitted to them by the charge. The court used language which plainly showed that the charge only meant that the absence of signals would not amount to negligence in law. See Austin v. Staten Island R. T. R. R. Co., 39 State Rep., 76. *Second*: The proposition covered by the plaintiff's second request was not sound, and it would have been positive error to have charged it. The jury might have found the facts to be as stated in that proposition, yet the legal conclusion of plaintiff's right to recover might not follow. That conclusion, as the court said, in qualifying its refusal, partly depended upon other circumstances not covered by the request. The question whether, under all the circumstances, the flagman, in stopping the horses, acted as an ordinarily prudent man would have acted was wholly ignored, and the right to recover was attempted to be based upon the bare fact (if it were a fact) that he did stop them. The court is not bound to and should not charge a proposition any part of which is unsound. Hickenbottom v. D. L. & W. R. R. Co., 122 N. Y., 91, 100; Lee v. Troy Citizens' Gas Light Co., 98 Ib., 115-121; Soria v. Davidson, 53 Superior, 470;

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Ryan v. Miller, 12 *Daly*, 77. *Third*: The exception to the charge of the second and third propositions submitted by the defendant was not well taken. Those propositions were perfectly correct. Independently of the question whether, in the absence of a statute requiring signals, the jury would have the right to predicate negligence in fact upon the failure to give them, it is plain that the only office of a signal is to apprise the traveler of the approach of a train. If he be apprised in any other way whatever in time to avoid the accident, then the absence of signals has no causal connection with the accident, and is an immaterial fact. *Pakalinsky v. N. Y. C.*, 82 *N. Y.*, 424; *Wohlfahrt v. Beckert*, 92 *Ib.*, 490, 495. The charge was not erroneous. We suppose the appellant will attempt to argue that the court meant that the plaintiff could not recover if Burke, the driver, was guilty of negligence contributive to the accident. But that involves a forced construction of the charge. The court had instructed the jury that a recovery must be based upon "the exclusive negligence of defendant and (the fact) that the plaintiff herself was entirely free from fault." This can mean nothing more than that actionable negligence of the defendant must be exclusive of any contributory negligence of the plaintiff herself, a perfectly sound proposition, to which plaintiff did not except, and could not have done so with any propriety in view of the allegations in her own complaint. The only reference to Burke, the driver, in this part of the charge, is in a separate and independent sentence, also embodying a sound legal principle that if his negligence, instead of that of defendant, caused (not contributed to) the injury, plaintiff could not recover. This sentence shows plainly that the phrase "exclusive negligence" did not refer to Burke at all, but to the defendant and plaintiff. "If the language (of a charge) is capable of different constructions, that construction will be adopted which will lead to an affirmance, unless it fairly appears that

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the jury were, or at least might have been, misled. *Losee v. Buchanan*, 51 *N. Y.*, 476, 492. At no time did the court charge and at no time was it requested to charge that Burke's negligence could be imputed to the plaintiff. And the court's comments were just. The whole case had been tried upon the question as to who caused the accident. The defendant's contention was that Burke was wholly responsible, that his actions were the cause and the sole cause. There had been no suggestion of contributory negligence. It is plain that the jury so understood it, and that they found, in accordance with the overwhelming preponderance of evidence, that Burke alone was to blame. The rule is that if, upon the whole, the cause is fairly submitted to the jury, their verdict will not be disturbed because of defects in some part of the charge. *Hickenbottom v. D. L. & W. R. R. Co.*, *supra*; *Caldwell v. N. J. Steamboat Co.*, 47 *N. Y.*, 282, 286; *Cont. Nat. Bank v. National Bank of Commonwealth*, 50 *Ib.*, 575. And since, to say the least, the court in the case at bar did not lay down an erroneous rule to the jury, its refusal (if there was a refusal) to charge this particular proposition, in addition to its full charge on the whole case, cannot be assigned as ground for reversal. *Rexter v. Starin*, 73 *N. Y.*, 601.

PER CURIAM.—The action was for damages from the alleged negligence of defendant. The plaintiff was in a carriage hired at a livery stable and driven by a man from that stable. The driver was proceeding to cross the defendant's railroad when a train was approaching. The carriage was on the track when the train struck it. The plaintiff was thereby hurt. On the trial the plaintiff's counsel asked the court to charge the jury, that if the negligence of the defendant contributed to cause the injury, then it is no excuse to the defendant that the driver may have been negligent. The court recognized the principle of law involved in the proposition yet be-

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lieved it to be inapplicable to the facts of the case. "I think in this case the controlling question is, was this the negligence of Burke, the driver, or was it the negligence of the railroad."

It seems from the facts as they appear on the appeal, that the jury might have found that both the driver and the railroad were jointly negligent. It was admitted on the trial that the negligence of the driver could not be imputed to the plaintiff. This question of joint negligence was not sent to the jury. They were only asked if the railroad by itself was negligent or if the driver by himself was negligent. The plaintiff did not have the benefit of finding from the jury whether each was partly negligent and, therefore, both jointly negligent. For this reason there should be a new trial.

Judgment reversed and new trial ordered, with costs to appellant to abide the event.

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MARY ELIZA ROWLAND, RESPONDENT v. CHARLES  
MILLER, IMPLEADED, ETC., APPELLANT.

*Injunction to enforce a covenant covering the Several lots occupied by parties, which forbids the use of the property "for any trade or business injurious or offensive to the neighboring inhabitants."*

The Taylor company, under a lease from the appellant Miller, uses the premises on the southeast corner of Madison avenue and Forty-third street, adjoining the residence of respondent, for the sale of caskets and goods for funerals ; also for embalming bodies, for autopsies and post-mortem examinations, and for the reception of human remains awaiting funeral rites and burial.

The question is whether the business described is injurious or offensive within the meaning of the covenant.

*Held*, that anything that is hurtful or noxious, that disturbs happiness, impairs rights, or prevents the enjoyment of them, is injurious ; and if it causes displeasure, gives pain or unpleasant sensations, is offensive. The disturbing cause must be real not fanciful, must be more than mere

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delicacy or fastidiousness, but it need not necessarily be apparent to the sense of sight, smell or hearing, for it may be injurious without offending either. The plaintiff is not required to prove that defendant is maintaining a nuisance. She is seeking to enforce a covenant restricting the use of the adjoining property, and all she is required to prove is, that the use complained of is repugnant to the letter and spirit of the covenant. The mere fact that in this case there has been a breach of the covenant, by which each party is bound, is sufficient for the interference of the court by an order of injunction. The uses of such an establishment as the defendant, no matter how well conducted, is a source of injury to adjoining property, and is, to the fullest extent, "injurious" as well as "*offensive to neighboring inhabitants*" within the meaning of that term as used in the covenant sought to be enforced. The judgment of the special term sustained.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

*Decided May 2, 1892.*

Appeal by defendant from a judgment entered at special term upon findings of the trial judge.

The facts in the case and the points contended for, fully appear in the opinions of the trial judge, as follows:

"McADAM, J.—The parties derive title from the same common source and subject to a covenant which forbids the use of the property for any trade or business 'injurious or offensive to the neighboring inhabitants.' The defendant 'The Taylor Co.,' under a lease from the owner, the co-defendant Miller, uses the premises on the southeast corner of Madison avenue and Forty-third street, adjoining the plaintiff's residence, as an undertaker's establishment, for the sale of caskets and furnishing goods for funerals, also for embalming bodies, for autopsies and post-mortem examinations, the cutting and dissecting of dead bodies for the ascertainment of the cause of death, and for the reception and temporary deposit of human remains awaiting funeral rites and burial. The question to be decided is whether the business com-

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bination described is 'injurious' or 'offensive' within the meaning of the covenant. Anything that is hurtful, noxious, disturbs happiness, impairs rights or prevents the enjoyment of them, is injurious, and if it causes displeasure, gives pain or unpleasant sensations, it is offensive. The disturbing cause must be real, not fanciful, something more than mere delicacy or fastidiousness, but it need not necessarily be apparent to the senses of sight, smell or hearing, for it may be injurious without offending either. Thus, by the general principles of equity, the continuance of a powder or dynamite or firework establishment or a house of ill-fame will be enjoined at the suit of one who is deprived of the comfortable enjoyment of his property by the close proximity of such a nuisance. *Hamilton v. Whitridge*, 11 *Md.*, 128. And it is no defence that there are other establishments to which similar objections lie. *Robinson v. Baugh*, 31 *Mich.*, 290. This upon the ground that tolerating one nuisance does not compel a party injured thereby to endure others. Nor does the failure to remonstrate against the erection of a nuisance create an estoppel against complaining of it afterward. *Burt v. Smith*, 3 *Phila. R.*, 363. Every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. *Sic utere tuo, ut alienum non lædas* is the fundamental principle on which cases of nuisances are decided. A man (not restrained by covenant) has the right to use his house as he pleases, but he must not do it in such a manner as to render the houses of his neighbors unfit for the purposes for which they were intended. A use of property in one locality and under some circumstances may be lawful and reasonable, which under other circumstances would be unlawful, unreasonable and a nuisance. *Campbell v. Seaman*, 63 *N. Y.*, 568. Nuisance, to an extent, is a question of locality and degree. In considering whether an act is a nuisance, regard must be had not

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only to the thing done, but to the surrounding circumstances. What would be a nuisance in one neighborhood might not be so to another. *Sturges v. Bridgman*, L. R., 11 *Ch.*, 852; *Hurlbut v. McCone*, 55 *Conn.*, 31; *Dennis v. Eckhardt*, 3 *Grant Cas.*, 390; *McCaffrey's Appeal*, 105 *Pa. St.*, 253; *Dallas v. Art Club*, 44 *Leg. Int.*, 512. A lawful trade may be so offensive that it should be carried on only in an out-of-the-way place. 3 *Bl. Com.*, 217.

“Blackstone defines a nuisance as being anything to the hurt or annoyance of another. By hurt or annoyance here is meant, not a physical injury necessarily, but an injury to the owner or possessor of premises as respects his dealings with or his mode of enjoying them. Wood says that a nuisance in the ordinary sense in which the word is used is anything that produces an annoyance; anything that disturbs one or that is offensive.

“In legal phraseology the term is generally applied to that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his own property, working an obstruction of or an injury to the right of another, and producing such material annoyance, discomfort or hurt that the law will presume consequent damage. The plaintiff has a higher equity. She is not required to prove that the defendants are maintaining a nuisance. She is seeking to enforce a covenant restricting the use of the adjoining property, and all she is required to prove is that the use complained of is repugnant to the covenant. While the theory upon which injunctions to restrain breaches of negative covenants are issued is that of presenting irreparable injury, yet the court will not enter into nice discriminations as to the extent of the damage. The mere fact that there has been a breach of covenant is a sufficient ground for interference. *Bispham's Eq.*, § 461. There is an observable distinction between natural and artificial causes

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of injury—that is, those resulting in ordinary course from causes beyond human control and those created by voluntary choice or agency. Thus, if a person is taken sick and dies in his own house, he is entitled to appropriate attendance therein and burial therefrom, and no one will be heard to complain, for the consequences are natural, unavoidable and such as every neighbor must, in the nature of things, expect and submit too. This is a lawful thing. But where, as in this case, the occupant of a house advertises for and invites persons in all parts of the country to send dead bodies to his establishment to be temporarily stored, cut up, artistically coffined and furnished with elaborate funeral outfits, services, hearses and carriages, human agency acting on choice, makes a business of other people's misfortunes, and parades death in the presence of the neighbors, to their pleasure or discomfort according to the view in which they regard such displays. *Seymour v. McDonald*, 4 *Sandf. Ch. R.*, 503. This is objectionable and illegal. In times gone by dead bodies were arrested or attached for debt and held until the friends or relatives satisfied the creditor by discharging the obligation. 10 *Cent. L. J.*, 325. Statutory provisions were found necessary both in England and here to stop the pernicious practice, and in section 314 of the Penal Code will be found this provision: 'A person who arrests or attaches the dead body of a human being upon any debt or demand whatever or detains or claims to detain it for any debts or demand or upon any pretended lien or charge is guilty of a misdemeanor.' The Penal Code (§ 305) provides that 'a person has the right to direct the manner in which his body shall be disposed of after death.' He or his relatives may permit the body to be dissected; and, except in a case in which a right to dissect it is given, every dead body of a human being must be decently buried within a reasonable time after death. *Ib.*, § 306.

“As to the right of relatives to control the burial of

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the dead, see 10 *Cent. L. J.*, 303; *Johnston v. Marinus*, 18 *Abb. N. C.*, 72 and note. The tendency is to get dead bodies out of the way, and apart from kindred, none but students (who use them for dissecting purposes) and ghouls take any interest in their possession. The sick and dead have been a constant source of complaint, and many adjudications have been made in consequence. Thus, it has been held, that a hospital for the reception and treatment of patients with contagious diseases, established in a public place, is a public nuisance and indictable as such. *Rex v. Vantadillo*, 4 *M. & S.*, 73; *Walcott v. Mellick*, 3 *Stockt. N. J.*, 309. The maintenance of a hospital for the care of sick infants, including any who may develop, after admission, contagious disease, was held to be a violation of the ordinary covenant against nuisances. *Gilford v. Babies' Hospital*, 21 *Abb. N. C.*, 159.

“An injunction will be issued to restrain the burial of the dead in a cemetery near one's premises when it appears that the interments there will endanger health by corrupting the air or contaminating the water of wells or springs. *Clark v. Lawrence*, 6 *Jones Eq., N. C.*, 83. So, too, the maintenance of a private tomb upon one's own land near the residence of another, when it is established that by reason of the effluvia arising from the bodies kept there renders the air unwholesome and impairs the market value of the property is held to be a nuisance. *Barnes v. Hathon*, 54 *Me.*, 224. These cases are cited merely to show to what extent the courts have gone in protecting neighborhoods from what were regarded as objectionable features. Any family of ordinary sensitiveness would at once pronounce the combination of purposes to which the defendant's establishment is put as shocking to the finer feelings, irritating, causing unpleasant sensations, and destroying the happiness of life and the comforts of home. The plaintiff owns her house and cannot readily leave it. While required to

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remain she is daily compelled to witness the arrival and removal of bodies in wagons and hearses, followed by the sorrowing friends and relatives of the departed. Such an establishment—no matter how well-conducted—is a source of injury to adjoining property, tending to depreciate its selling and rental value, and is to the fullest extent ‘injurious,’ as well as ‘offensive to neighboring inhabitants’ within the meaning of that term as used in the covenant. No change in the neighborhood relieves from the effect of the covenant sought to be enforced. Within the rule declared in the case of the *Columbia College v. Thacher*, 87 *N. Y.*, 311, a change of neighborhood from private dwellings to store property may so far relieve from the covenant as to accommodate the change caused by circumstances, *i. e.*, to permit private dwellings to be occupied as stores, but so much of the covenant as enjoins noxious occupations remains in force to protect the neighborhood in its new condition for business from the evils especially inhibited, if the covenant can be as well applied after as before. Municipalities, deferring to public sentiment, have prohibited the interment of the dead within their corporate limits, and have been sustained by the courts. *Brick P. Church v. Mayor*, 5 *Cow.*, 538; *Coates v. Same*, 7 *Ib.*, 585; *Kincaid’s Appeal*, 66 *Pa. St. R.*, 423; *S. C.*, 5 *Am. R.*, 377; *City Council v. Wentworth*, 4 *Strobh. R.*, 310; *Lake View v. Rose Hill Cemetery*, 70 *Ill.*, 192. ‘The burial of the dead within the limits of towns and cities,’ says Tiedeman in his work on *Limitations of Police Power*, § 122d, ‘has always been and still is a common evil.’ These *dicta* show that the prevailing tendency is to prevent, as far as possible, the collection of dead bodies in cities, by excluding them therefrom as a protection of inhabitants from any dangers which might be engendered. Death in any form is an unwelcome visitor, and the great majority of people shun places where bodies are awaiting interment. Such places are

far from being attractive except to those morbidly curious. While every advance in science is hailed with delight, popular opinion has not yet reached the belief that the general good requires that private corporations or individuals shall for gain or from motives of philanthropy open dead houses in fashionable or thickly populated parts of the city where autopsies and post-mortems are held, or where dead bodies are cut up and stored, or where funerals are furnished without regard to number, whenever required. Cremation in the city would be as readily tolerated. All of these things are good in their place, but offensive everywhere else.

“Dead houses, morgues, dissecting-rooms and establishments for autopsies and post-mortems, or for the reception of dead bodies, have no place in a city like New York, and, if tolerated, should for sanitary and other reasons be permitted only along the river fronts or in some out-of-the-way place, so far removed from inhabitations as not to offend the amenities of life and to be absolutely free from all harmful influences. Where a covenant exists, as in this case, it is the duty of the court to enforce it according to its letter and spirit. *Bradley v. Walker*, 14 *N. Y. Supplt.*, 315. The chapel in the rear of the building is not a church, within the proper meaning of that term. It has no pastor, no religious principles and no services, except as a mere incident to the funeral business carried on. If a funeral is held, a clergyman or substitute is employed to suit the views of the friends of the deceased. Churches, properly so-called, are dedicated to the worship of God according to some prescribed form of religion, and funerals are but a mere incident of their work. In the present case the ‘chapel’ is merely part of the business, and it matters not who occupies the pulpit or what his views are as to a future state or whether he has any religious belief, so long as he suits his employers and earns his reward.

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“It follows that the plaintiff is entitled to judgment with a perpetual injunction restraining the continuance of the acts complained of, with costs and \$300 allowance. Settle decree on notice.”

“McADAM, J.—The combination of purposes to which the defendant's premises were put was held to be a violation of the plaintiff's rights under the covenant running with and affecting the land, and the decree in consequence enjoined such use as illegal. It was not intended to prohibit the carrying on of any lawful business not inhibited by the covenant, and the sixth paragraph was purposely inserted to exclude the implication that any such purpose was intended. Courts in enforcing obligations must take care not to infringe rights. The Taylor Co. has complied with the provisions of the decree, has evinced a willingness to accord the plaintiff her full rights and asks to have the injunction modified so that in protecting her, it may not unnecessarily injure it. The injunction will therefore be modified in the manner and to the extent indicated in the proposed order on payment within two days of \$454.87, the taxable costs included in the judgment. If the injunction in the modified form is abused, such abuse may (be) restrained or punished on application. This would be implied if not expressed. The fact that Miller, the lessor, has appealed, does not make the application by the lessees irregular or inconsistent. The lease is for a term of years and by it the lessees have rights and obligations different from those of the owner. Whether the particular estate of the owner can suffer any appreciable damage by the injunction directed against a particular use of the property by the lessees is a question that may be more appropriately discussed when his appeal is heard. His grievance will then be considered and the fact that he has appealed should not prejudice the lessees whose business interests distinct from the

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owner may require them to make any reasonable use of the property (not repugnant to the plaintiff's rights) in order to pay their rent and preserve their estate. Submit order."

*Burrill, Zabriskie & Burrill*, attorneys, and *George Zabriskie* of counsel, for appellant.

*Lockwood & Hill*, attorneys, and *John L. Hill* of counsel, for respondent.

PER CURIAM.—Judgment affirmed, with costs, on opinion delivered at special term.

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FRAZIER M. DOLBEER, APPELLANT v. JOHN STOUT, RESPONDENT.

*Stay of proceedings in this action until the trial and determination of another action pending in Supreme Court.*

The Supreme Court action was commenced first. If that action is stayed the defendant here, who is the plaintiff there, can use only a small portion of his demand, and may be compelled to renew his litigation for the balance ; but if the Supreme Court action is tried first, the entire amount of defendant's demand will be litigated and disposed of. The law does not encourage double trials and multiplicity of suits, and the court will stay one action and allow the other in which entire relief may be awarded to proceed. Defendant's motion for a stay granted.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

*Decided May 2, 1892.*

Appeal by plaintiff from an order made at special term staying all proceedings in this action until the trial and determination of an action pending in the Supreme Court.

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Opinion PER CURIAM.

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The following opinion was rendered by Judge McADAM at the special term upon which the order appealed from was affirmed.

“McADAM, J.—The Supreme Court action was commenced first. It is to recover \$19,546.09, and but for the voluntary assignment made by Linde & Co., the cross demand could have been litigated in the Supreme Court action. If that action is stayed, the defendant here, who is the plaintiff there, can use only a small portion of his demand (\$4,811.46), and may have to renew his litigation as to the balance. If the Supreme Court action is tried first, the entire \$19,546.09 will be litigated and disposed of. The law does not encourage double trials and multiplicity of suits, and the court will stay one action and allow the other, in which the entire relief may be awarded, to proceed. *People v. Northern R. R. Co.*, 53 *Barb.*, 98; *Jackson v. Schaubert*, 4 *Cow.*, 78; *Jackson v. Stiles*, 5 *Ib.*, 282; *McFarlan v. Clark*, 2 *Sand.*, 699; *Avery v. N. Y. C., etc., R. R. Co.*, 30 *State R.*, 239; *S. C. 9 Supp.*, 404; *Third Ave. R. R. Co. v. Mayor*, 54 *N. Y.*, 159; *N. Y., L. E. & W. R. R. Co. v. Robinson*, 15 *State R.*, 237; *Sorley v. Brewer*, 18 *How.*, 509; *Schuehle v. Reiman*, 86 *N. Y.*, 270; *Cushman v. Leland*, 93 *Ib.*, 652; *Pusey v. Bradley*, 46 *How.*, 255. It follows that the defendant's motion for a stay must be granted and the plaintiff's motion to compel an election denied. No costs.”

*Edward S. Clinch*, attorney and of counsel, for appellant.

*Thomas J. Farrell*, attorney, and *D. M. McMahon* of counsel, for respondent.

PER CURIAM.—The order should be affirmed, with costs, upon the opinion of the special term.

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MARY A WARDLAW, AS ADMINISTRATRIX, ETC., RESPONDENT v. THE MAYOR, ETC., OF THE CITY OF NEW YORK, APPELLANT.

*City Surveyor; Not an office within the meaning of section 55, of the Consolidation Act.*

This action was to recover the salary of James R. Wardlaw, as assistant engineer, during the interim between the time of his suspension and his final discharge. The defence was that Wardlaw was appointed city surveyor, and his attempt to hold the position of assistant engineer was holding two offices which, under section 55 of the Consolidation Act, prevents a recovery.

*Held*, that defendant might have discharged decedent and relieved itself from all liability, but it could not suspend him without pay. The appointment of city surveyor is not an office within the meaning of section 55 of the Consolidation Act. Office, in the sense there employed, embraces the idea of public station, tenure, emolument and duties, involving the right and duty to execute some public trust. The position of city surveyor has no tenure or salary; does not exist independently of the incumbent, and does not become vacant by his death, removal or resignation.

Before SEDGWICK, Ch., J., and FREEDMAN J.

*Decided May 2, 1892.*

Appeal by defendant from a judgment entered upon a verdict directed by the court at trial term, and from an order denying the defendant's motion for a new trial.

The following statement and opinion, upon which the judgment and order appealed from were affirmed, was filed by the trial judge on his denial of defendant's motion for a new trial.

"The action was to recover \$5,700, and interest, aggregating \$6,821, for the salary of James R. Wardlaw, as 'assistant engineer,' during the interim between the time of his suspension and discharge. The defendant concedes the appointment, the suspension and dis-

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charge, and the readiness of Wardlaw to perform his duties at all times. It claims, however, that because Wardlaw was appointed 'city surveyor' in 1877 by a resolution of the common council, his attempt to hold the position of 'assistant engineer' was the holding of two offices, which, under section 55 of the Consolidation Act, prevents a recovery. The court directed a verdict in favor of the plaintiff for the amount claimed, and the defendant moves for a new trial.

"McADAM, J.—While the defendant might have discharged the decedent, and relieved itself from liability, it could not suspend him without pay (*Gregory v. Mayor*, 113 *N. Y.*, 416; *Emmitt v. Same*, 38 *State R.*, 355, *Affd., Ib.*, 907), and the moneys he earned in other employments during the suspension are not to be credited to the defendant. *Fitzsimmons v. City of Brooklyn*, 102 *N. Y.*, 536; *Lethbridge v. Mayor, etc.*, 39 *State R.*, 385. There is nothing in the case which shows that the decedent abandoned or relinquished the office of assistant engineer, or in any manner discharged the defendant from its obligation to pay. The real question involved turns on whether the decedent, because he held the position of 'city surveyor' under a resolution of the common council passed in 1877, held an office within the meaning of the prohibition contained in section 55 of the Consolidation Act, which made him ineligible to hold the position of 'assistant engineer' under the defendant.

"There is no express authority given to the common council to appoint city surveyors, and if the board possesses any power upon the subject it is by implication only. But that question need not be seriously considered, for it is apparent that the appointment is not an office within the meaning of section 55, *supra*. Office, in the sense there employed, embraces the idea of public station, tenure, emolument and duties, involv-

ing the right and corresponding duty to execute some public trust. *In re Hathaway*, 71 *N. Y.*, 238; *People v. Duane*, 121 *Ib.*, 367; *U. S. v. Hartwell*, 6 *Wall.*, 385; *U. S. v. Germaine*, 99 *U. S. R.*, 508. In legal contemplation, an office is an entity, and may exist though without an incumbent. *People v. Stratton*, 28 *Cal.*, 382. It is an employment on behalf of government, in any station of public trust, not transient, occasional or incidental. It is where one has to do with another's affairs against his will, and without his leave. The position of city surveyor has no tenure or salary. It does not exist independently of the incumbent, and does not become vacant by his death, removal or resignation. It resembles that of licensee more than anything else.

“Every office implies an authority to execute some portion of the sovereign power of the State, either in making, executing or administering the laws. The question came up in this court when it held that Frederick Dwight Olmstead in holding the position of landscape architect of public parks and commissioner of state surveys was not holding two offices within the meaning of the section referred to.

“The court said: ‘One who receives no certificate of appointment has no term or tenure of office, but performs such duties as are required of him by the persons employing him, and whose responsibility is limited to them, is not an officer and does not hold an office.’ *Olmstead v. The Mayor*, 42 *N. Y. Superior Ct. R.*, 488.

“The Court of Appeals has held that the legislative prohibition to common council against creating new officers extends to clerks, but not to janitors and ordinary servants, for they are not officers. *Sullivan v. Mayor, etc.*, 53 *N. Y.*, 652; *Costello v. Same*, 63 *Ib.*, 48. The decedent, by reason of his position of city surveyor, was in no sense a clerk, city employee or public official, and did not come within the purpose and

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intent of the prohibition contained in section 55, *supra*.

“ ‘The distinction,’ said the Court, in *Olmstead v. Mayor, supra*, ‘is plainly taken between a person acting as a servant or employee, who does not discharge independent duties, but acts by direction of others, and an officer empowered to act in the discharge of a duty, or trust, under obligations imposed by the sanctions and restraints of legal authority in official life.’ The verdict was properly directed, and the motion for a new trial must be denied.”

*William H. Clark*, counsel to the corporation, and *Sidney J. Cowen* of counsel, for appellant.

*Kellogg, Rose & Smith*, attorneys, and *L. Laflin Kellogg* of counsel, for respondent.

PER CURIAM.—The judgment and order should be affirmed, with costs, upon the opinion filed by the trial judge on denying defendant’s motion for a new trial.

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HENRY IDEN, RESPONDENT v. ISAAC SOMMERS,  
APPELLANT.

*Chattel mortgage—Contract of sale—Chapter 315 of the Laws of 1884, as amended by Chapter 495 of the Laws of 1886, not applicable to household goods, when contract of sale is executed in duplicate, and one duplicate is delivered to the purchaser.*

The property in question, consisting of gas fixtures, were leased by plaintiff to one Woolf on the conditional sale and installment plan, the title to remain in plaintiff until the fixtures were paid for. While the property was in possession of Woolf he mortgaged the same to the defendant, who subsequently foreclosed the mortgage and disposed of the fixtures. The plaintiff brings suit to recover their value as for conversion. The defence

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Opinion of McADAM, J.

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is that defendant had no knowledge of the transaction between plaintiff and Woolf, and plaintiff having neglected to file the agreement providing that the title to the fixtures should remain in him until paid for, it became inoperative and void under Chapter 315, Laws of 1884. The Act cited, as amended in 1886, does not apply to "household goods."

*Held*, that gas fixtures are "household goods" within the proper meaning of that term, which has been defined as more comprehensive than "furniture," and includes every article of personal property in the house or on the premises intended for ornament, use or consumption.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

*Decided May 2, 1892.*

Appeal by defendant from a judgment entered for the plaintiff, upon a verdict directed by the court, and from an order denying defendant's motion for a new trial.

The following opinion, upon which the judgment and order appealed from were affirmed, was filed by the trial judge on his denial of defendant's motion for a new trial.

McADAM, J.—"The property consisting of 'gas fixtures' was leased by the plaintiff to Woolf on the conditional sale and installment plan, title to remain in plaintiff until the fixtures were paid for. While the property was in the possession of Woolf he mortgaged the property to the defendant, who subsequently foreclosed his mortgage and disposed of the fixtures, thereby making himself liable to the plaintiff in trover as for conversion. *Lempke v. Peterson*, 1 *City Ct. R.*, 15. The defence is that the defendant had no knowledge of the conditional agreement under which Woolf held the property, and that the plaintiff having neglected to file such agreement 'with the conditions and reservations therein,' those providing that title to the fixtures should remain in the plaintiff until they were paid for became inoperative and void. *Laws*, 1884, chap. 315. There would be force in this objection but for the fact that the

act cited does not apply to 'household goods' (*Laws*, 1885, chap. 488; *Laws* 1886, chap. 495), and 'gas fixtures' are 'household goods' within the proper meaning of that term. They were sometimes comprehended by the term 'furniture,' which means 'that which furnishes or whatever is added to the interior of a house for use or convenience,' *Bell v. Colding*, 27 *Ind.*, 179; *Crossman v. Baldwin*, 49 *Conn.*, 491; *Burrill's Law Dict.*, p. 33, and includes brass work, knobs, window shutters, etc. (*Worc. Dic.*). In *Shaw v. Lenke*, 1 *Daly*, 487, 'gas fixtures' are included in the term 'articles of furniture movable in their nature, although attached by screws, nails, brackets, etc. See also, *Lawrence v. Kemp*, 1 *Duer*, 363; *McKeage v. Hanover Fire Ins. Co.*, 16 *Hun*, 239, *affd.*, 81 *N. Y.*, 38. In *Camagy v. Woodcock*, 2 *Mundf. Va. R.*, 234, the phrase 'household goods' is defined as more comprehensive than 'furniture,' including everything in and about the house that has usually been held and enjoyed therewith, and would tend to the comfort and accommodation of the householder. See also, 9 *Am. & Eng. Enc. of Law*, 782, note 3; *Paton v. Sheppard*, 10 *Sim.*, 186; *Manning v. Purcell*, 2 *Sim. & G.*, 284. The expression 'household goods,' includes every article of personal property in the house or on the premises, intended for ornament, use or consumption (*Dayton v. Tillow*, 1 *Robt.*, 21), even coal and wood provided for the use of the family. *In re Fraser*, 92 *N. Y.*, 239. Those articles do not lose their generic character by being placed in a saloon or store, unless the intention to exclude them from the operation of the term 'household goods' is made apparent, and that is not so here. It is the species of property rather than the temporary use made of it that determines its true character under the statute. So considered it follows that 'gas fixtures' are by force of the Acts of 1885 and 1886, *supra*, taken out of the operation of the Acts, 1884, *supra*, requiring conditional sale agreements to be filed. The Acts of

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Appellant's points.

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1885 and 1886 were passed in the interest of those who sell 'household goods' on the installment plan, and must be liberally construed to effectuate their purpose. The objection that a duplicate copy of the agreement was not delivered to Woolf was not made at the trial, when it might have been obviated, and cannot be raised for the first time now (cases cited in 33 State R., 425.)

"If the construction aforesaid be correct the verdict in favor of the plaintiff was properly directed, and the motion for a new trial must be denied."

*Hess, Townsend & McClelland*, for appellant, argued:—

That gas fixtures as they were placed and in use were not household goods. The evidence shows that they were chandeliers purchased for and used in a liquor saloon. The affidavit of the purchaser, Albert E. Woolf, upon the mortgage in evidence, shows that he resided at No. 1081 Lexington avenue. Aside from the authorities hereinafter cited it seems self-evident that goods, in order to be household goods, must be used in, or in some way connected with a household. *Bouvier* defines "household" as follows: "Those who dwell under the same roof and constitute a family."

*Webster* defines the same word as "belonging to the house and family; domestic." In 21 *Albany Law Journal*, page 83, see note of case *Calhoun v. Williams*, it is said: "The term 'household' literally means the inmates of the house, the family; those whom the house holds." Merchandise, in order to be household furniture, must in some way be used by, or relate to a family. The authorities are clearly to the effect that certain articles may be household goods, or not, depending upon the use to which they are applied. For example, plate used in a family passes under a devise or conveyance of "household goods;" but plate not used in a family will not so pass.

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Appellant's points.

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See *Bouvier's Law Dictionary*, title "Household furniture," and cases cited. A shotgun will so pass if it is kept for the defence of the house. *Matter of Frazer* 92 N. Y., 246. If otherwise it will not pass. *American and English Encyclopedia of Law*, volume 9, title "Household," note 3. In *Dayton v. Tillou* 1 Rob. 21, ROBERTSON, J., after stating that "household goods" \* \* \* fairly embraces articles commonly used in a family, says (see on page 28): "A testator may, however, render other things household goods or household furniture by his use of them. Books belonging to a well-filled library, wines in a well-stored cellar, paintings and statues in a large gallery, curiosities of an extensive museum, numerous specimens belonging to a well-selected mineralogical or other collection may not be or may be household goods or furniture, according to their connection with the owner's residence and his own and his family's habitual use of or access to them." In *American and English Encyclopedia of Law*, vol. 9, title 1, "Household," the following propositions are stated as settled by the authorities cited: "Household furniture, etc., includes only what is in domestic use and not articles which are in the way of testator's trade or business." "Where a man owned a hospital, in a town other than that of his residence, which he employed, under contracts with the naval commissioners, in entertaining the sick and wounded of the navy, the furniture of this hospital was not included in the expression 'household goods' as used in an exception in a marriage settlement with his wife, by which she renounced her claim upon his property." "Beds and furniture used by the testatrix in a boarding-school kept by her, and in which she lived, passed under her will as household furniture, but the schoolroom furniture, as the desks, etc., would not have passed." "Liquors, bar furniture and beds for guests in an inn are not household goods, within the meaning of the rule that it is not a badge of

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Appellant's points.

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fraud to permit household goods levied upon in execution to remain in the debtor's possession." It seems clear, therefore, from the authorities cited that articles which may be "household goods" when used in the family for its comfort and convenience, are not household goods when used for other purposes. The case of *Dayton v. Tillou*, above cited, is very nearly in point. In that case Thomas Reilly at one time was the keeper of a public house where he resided with his family. The house was furnished, and, in addition to the furniture, there was a collection of curiosities kept there as an attraction for guests. Subsequently he leased the public house with the furniture and removed with his family to another residence which was furnished. Some of the furniture, pictures and curiosities were removed by him to his residence and others were left at the public house temporarily, to be removed when he desired. Upon the death of Mr. Reilly he bequeathed to his wife "all the household goods and household furniture of every kind and description." It was held that under the bequest his wife took the furniture in the house which he occupied and such pictures and curiosities as were left temporarily at the public house, to be removed at his pleasure; but she did not take the furniture, pictures or curiosities which were designed to be left for use at the public house. The court held that she was entitled: 1st. To the articles which had been removed from the public house to his own home and used in his family. 2d. To the articles which he had left at the public house temporarily, intending to remove them to his home, and which were not used as ornaments of the public barroom; and says (see on page 29): "The silver plate mentioned in the inventory annexed to the answer which had not been used in the testator's private residence, curiosities not found there, large vessels suitable only for a hotel, as well as billiard tables, with their appurtenances, used at the hotel, do not pass under

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Respondent's points.

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the bequest." The case last cited will be found to fully support the defendant's contention.

*Abram Kling*, for respondent, argued :—

The language of the statute which provides "That the contracts for the sale of household goods shall not be required to be filed, has reference to gas fixtures sold by the plaintiff to Woolf. In 9 *American and English Encyclopedia of Law* (note 3), 782, the word household goods is defined to be "all articles of household of a permanent nature, articles which are not consumed in their use and enjoyment, and which are used in, or acquired by the testator for his house." In *Camagy v. Woodcock*, 2 *Munf. (Va.)*, 234, the word household goods is defined as a wider term than furniture, including everything in and about the house that has usually been held and enjoyed therewith, and would tend to the comfort and accommodation of the householder. In *Dayton v. Tillou*, 1 *Robt.*, 21, the word household goods has been defined by the general term of this court as embracing pictures, statues and a collection of curiosities were embraced in the words household goods. In the *Matter of Fraser*, 92 *N. Y.*, the Court of Appeals held: "That coal and wood for use of the family and a shot-gun came under the term of household property." In *Paton v. Shepperd*, 10 *Sim.*, 186, tenant's fixtures in a leasehold house, occupied by the testator, were held to pass as household furniture. In *Manning v. Purcell*, 2 *Sim. & G.*, 284: A tavern-keeper whose dwelling-house is remote from his tavern, but whose family frequented the latter as much as the former, by the use of the term "household furniture" in his will, passes the furniture of the tavern. In *Richardson v. Hall*, 124 *Mass. Courts*, the Supreme Court held "that bronze statuary and pictures were included in the terms household property." If the plaintiff furnished Woolf with lamps instead of "gas fixtures" there can be no

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Statement of the Case.

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question that they would have been regarded as household goods, and under the statute gas fixtures must be considered as necessary for the benefit of a householder as lamps. The law of 1886 was enacted for the benefit of the person who sold household goods, which would have been such goods or chattels which may be used for household purposes, and must be liberally construed, and as these fixtures are to illuminate the house, it must under decisions cited *supra* be so regarded. The fact that a party buying household goods uses them for purposes other than the household, does not deprive the owner of the property of his right and protection which the statute affords him.

PER CURIAM.—The judgment and order should be affirmed, with costs, upon the opinion filed by the trial judge on denying defendant's motion for a new trial.

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JUSTUS HOERLE, PLAINTIFF v. JOSEPH McILHARGY, DEFENDANT.

EDWARD JACOBS, RECEIVER, RESPONDENT IN THE  
APPEAL ON THE MOTION OR PETITION OF THE McFARLAN CARRIAGE CO., APPELLANT.

*Partnership, action for the dissolution and appointment of a receiver, etc.  
—Distribution of estate—Preference of creditors.*

In this case, after the appointment of a receiver of the co-partnership property, the appellant being a judgment creditor, applied to the court at special term in the original action for an order that the receiver pay out of the funds in his hands the amount of the judgment. The court below denied the petition, and from such denial this appeal was taken.

*Held*, that the application was properly denied. In a case like this the court should consider and determine whether the applicant had a right to a preference over other creditors of the co-partnership. If it appeared

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Appellant's points.

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that the estate was certainly solvent, leave might be granted, but if insolvent, and there was nothing in the claim that should give priority or preference, the application should be denied. In this case there was no reason why the appellant should not share equally with the other creditors.

Before SEDGWICK, Ch. J., and McADAM, J.

*Decided May 2, 1892.*

Appeal from order denying appellants' motion for payment by the receiver of a judgment.

*William King Hall*, for appellant, argued :—

I. A judgment obtained adversely against partners is entitled to priority against the assets of the firm, although an action has been previously commenced by one of the partners for a dissolution and an accounting, in which a receiver has been appointed. *Warring v. Robinson*, *Hoff. Ch.*, 524, citing *Pratt v. Robinson*, *July*, 1839; *Adams v. Hackett*, 7 *Cal.*, 187; *Ib. v. Woods*, 8 *Ib.*, 153; 9 *Ib.*, 24. The case of *Holmes v. McDowell*, 15 *Hun*, 585, *aff'd* without opinion, in 76 *N. Y.*, 596, may appear adverse to our contention, but, upon careful consideration, it will be found not to be so. It reviews the above authorities and distinguishes them. *WESTBROOK, J.*, says: "The object of the action was to adjust the affairs of the partnership, *which was insolvent*, and to divide the property equally among its creditors. \* \* \* But the cases cited are unlike the present. In all of them, the suit was instituted by the one partner against the other for his own protection against the alleged fraudulent conduct of such other. They all lacked the elements of *admitted insolvency*. \* \* \* It is possible, though it is not fully conceded to be sound, that when one partner seeks the aid of the court against the other, and the tribunal invoked simply holds the property for the benefit of its owners, it may permit one

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Respondent's points.

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creditor to obtain priority over another." We insist that the distinction made applies to our case, and shows us entitled to the priority claimed. See also, *Keeney v. Home Ins. Co.*, 71 *N. Y.*, 396, which held: "A receiver *pendente lite* is a person appointed to take charge of the fund or property to which the receivership extends while the case remains undecided. The title to the property is not changed by the appointment. The receiver acquires no title, but only the right of possession as the officer of the court. The title remains in whom it was vested when the appointment was made." Cited in *U. S. Trust Co. v. N. Y. W. S. & B. R. Co.*, 101 *N. Y.*, 483; *Ogden v. Arnot*, 29 *Hun*, 146, citing *Finke v. Funk*, 25 *Hun*, 616, which held: "A receiver appointed in a partnership case *pendente lite* has no powers except such as have been conferred by the order appointing him. He is a common law receiver, and his duty is to protect the property during litigation. The order appointing him effects no change in the title to the property."

II. It is correct practice for the judgment creditor to bring his lien to the attention of the court in this action, and ask to have the execution satisfied out of the moneys in hands of the receiver. *Walling v. Miller*, 108 *N. Y.*, 173.

*Michael Jacobs*, for respondent, argued:—

I. The mere recovery of the judgment does not give the creditor a preference. "Equality in the payment of debts by a receiver is the rule of law, unless by diligence or some special reason, a preference is declared of one creditor, or of one class, over creditors generally. No such circumstance exists in this case, and the judgment is to be regarded as determining simply the validity of the plaintiff's claim." \* \* \* "His debt is adjudged to be valid, but it must take its chance of payment with other valid debts in the general adminis-

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Opinion PER CURIAM.

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tration of the estate.” *Clark v. Brockway*, 1 *Abb. Ct. App.*, 351.

II. The estate being personal, vested in the receiver from the time and by virtue of his appointment, *Chautauqua Co. Bk. v. Risley*, 19 *N. Y.*, 374. And as the creditor did not commence his suit until two months thereafter, he certainly can have no lien on the copartnership’s assets. The property is in the custody of the law for distribution equally among all the creditors. *Noe v. Gibson*, 7 *Paige*, 513; *Walling v. Miller*, 108 *N. Y.*, p. 173.

III. The receiver is not affected by a judgment to which he was not a party. *People v. Knickerbocker Life Ins. Co.*, 106 *N. Y.*, 623.

IV. The attempt of the creditor is to obtain a preference over other creditors and should not prevail. If it does prevail, the appointment of a receiver in a copartnership controversy becomes a mere formality and of no practical value whatever.

V. The case of *Walling v. Miller*, 108 *N. Y.*, 173, cited by the appellant in the court below, in no way aids it. On the contrary, it is an authority in support of the contention of the receiver. In that case it will be seen (at p. 177), the receiver was appointed “two days after the levy by virtue of the execution,” while in the case at bar the receiver was appointed several months before the suit in the district court was even instituted.

PER CURIAM.—The action is for a dissolution of a partnership and for an accounting. In it a receiver had been duly appointed and had taken possession of the partnership property. After this the appellant began an action against the partners for a partnership indebtedness, and recovered judgment in the sum of ninety dollars. On these facts the appellant made petition to the court below, that the receiver pay out of the funds

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Statement of the Case.

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in his hands the amount of the judgment. The court denied the application, and this appeal is taken from that denial. The decision was correct. There was no legal lien on the property through the judgment and execution. The property was in custody of the law and was inaccessible to an execution or its usual consequences. The sheriff, to levy, would be obliged to ask the leave of the court to that end. As the receiver had not taken possession, after the execution had issued, the court would not be pressed by the consideration that there was a legal lien. In a case like this the court should look into the whole case and find whether, substantially, the applicant had a right to a preference. If the estate were certainly solvent, leave might be given. But if insolvent, and there was nothing in the nature of the claim that should give priority, the court should deny the application. In this case there was no reason why the applicant should not share equally with other creditors.

Order affirmed, with ten dollars costs.

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VICTORIA P. WATSON, ET AL., APPELLANTS v.  
MARY L. PINCKNEY, ET AL., RESPONDENTS.

*Deed of real estate to one party at the direction of another who pays the consideration—Trusts, express or implied—Undue influence over the execution of a will or a conveyance.*

The object of this action was to obtain a judgment of this court, to the effect, that certain pieces of real estate, the title to which, at the time of the death of Isaac L. Pinckney, stood in the name of his widow, Henrietta Pinckney, were equitably a part of the estate of Isaac L. Pinckney when he died. These pieces had been duly conveyed to Henrietta Pinckney at the request of her husband, who paid the consideration for the same. The plaintiffs claimed that the conveyances in question created a trust in said

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Appellants' points.

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Henrietta Pinckney to consider and treat and dispose of the same, as the property and estate of Isaac L. Pinckney, under his last will and testament, in which he appointed the said Henrietta as sole executrix. The plaintiffs also claimed that said Henrietta Pinckney had accepted such grants on her promise that she should hold the said real estate in trust and not as her own absolute property.

The court held that no promise had been proved, and that if it had been so proved it would have been void, as also would have been the so-called and claimed trust. That if such an oral promise or oral trust had been established, it would not have been fraud on the part of the grantee to have refused to recognize the validity of either. The inference from the whole testimony in the case is, that Isaac L. Pinckney did intentionally what he did do, or cause to be done, in regard to the conveyances, intending and meaning that his action in the premises should have its full legal effect.

Before SEDGWICK, Ch. J., and McADAM, J.

*Decided May 2, 1892.*

Appeal from a judgment entered upon findings, etc., made at special term.

*William J. Hardy*, for appellants, argued:—

I. Wherever persons maintaining relations of confidence to each other, have dealings, in the course whereof one obtains a benefit from the other, and the transaction is impeached, it is incumbent upon the beneficiary to establish its righteousness by affirmative proofs. In ordinary cases, the donee in accepting a gift assumes the burden of showing whenever called upon that the donor knew what he was doing and intended that his act whereby the gift was conferred should have the operation claimed for it. And where the relations between the donor and donee were of a fiduciary character, it is necessary for the latter to show further, that the donor's intention to confer the gift was fairly produced. While equity does not deny the possibility of valid transactions between the two parties, it raises a presumption against the validity of every transaction between

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Appellants' points.

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them by which one obtains a possible benefit, and casts upon that party the burden of proving affirmatively his compliance with equitable requisites, and of thereby overcoming the presumption. The principle is applied with great emphasis and rigor to gifts, whether they are simple bounties, or purport to be the effects of liberality based upon antecedent favor and obligations. Contracts made upon a valuable consideration are not scrutinized with quite so much severity as gifts, but even they are subjected to the operation of the principle and must conform to its requirements. The courts have always been cautious not to fetter this useful jurisdiction by defining the exact limits of its exercise, and have carefully refrained from defining the particular instances of fiduciary relations, in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact; in which there is a confidence reposed, which invests the person trusted with an advantage in treating with the person so confiding. And the rule is not restricted in its application to cases in which by reason of the superiority of one of the parties a domination or duress is imported. It is general in its scope and embraces every case in which a benefit is obtained from one who trusts or confides in the beneficiary, and without assuming that there was in fact either duress or undue influence, it imposes upon the beneficiary the obligation of showing that he has not unjustly or unfairly practiced upon his benefactor. If the transaction appears to have had its spring and origin in the relation of confidence, if it appear that some trust reposed was a controlling ingredient in the motive of the one from whom the bounty proceeds, then the one who has profited by the trust or confidence acquires his advantage *cum onere*. The one who impeaches the result need only show that a benefit has arisen out of confidential

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relations, and this once appparing, the burden is thrown upon the defendant who seeks to maintain the benefit. Where a person through the influence of a confidential relation acquires title to property or obtains an advantage which he ought not in equity and good conscience to retain, the court to prevent the abuse of confidence will convert him into a trustee, and compel him to restore what he has unjustly acquired or seeks unjustly to retain. *Hoghton v. Hoghton*, 15 *Beav.*, 300; *Rhodes v. Bate*, 1 *L. R. Ch. App.*, 252; *Dent v. Bennett*, 4 *My. & Cr.*, 269; *Billage v. Southee*, 9 *Hare*, 534-540; *Miller v. Simons*, 72 *Mo.*, 669; *Bigelow on Fraud*, p. 354 (ed. 1888); I. *Story Eq. Jur.*, §§ 307, 311, 218; II. *Pom. Eq. Jur.*, §§ 955-957, 963; *Fisher v. Bishop*, 108 *N. Y.*, 28; *Case v. Case*, 49 *Hun*, 83; *Weller v. Weller*, 44 *Ib.* 176, *et seq.*; *Boyd v. De la Montaigne*, 73 *N. Y.*, 502; *Bergen v. Udall*, 31 *Barb.*, 9; *Carpenter v. Mosher*, 32 *State Rep.*, 82.

II. The wisdom of the rule of evidence in these cases was never more highly signalized than by the facts here. The proofs are clear and strong that the husband never intended that the deeds should operate as absolute gifts; that he never permitted the deeds to interfere with his use and enjoyment of the properties; that he never in fact yielded up or parted with his interest in the houses to the extent required in gift; and on the other hand, that his wife never construed the transactions as gifts; that she herself never enjoyed the use or benefits of the lands; and that she never, until shortly prior to this action, asserted any claim either verbally or by conduct, that was inconsistent with her husband's title. It is not debatable that Isaac L. Pinckney was moved to place these titles in his wife by the fact of her being his wife; that he was affected by the confidential relations that existed between them; that in trusting her with these lands and the performance of his wishes in regard to them, he confided in her as his wife; and that he would

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not have caused these titles to be conveyed to her had she not been his wife, had he not so confided in and trusted her, and had she not by her previous fulfillment of similar trusts, tacitly or passively encouraged him to further entrust to her the titles in suit. And she thereby accepted and sanctioned as obligatory upon her conscience, the provision he was making for his children after her; and made with him a, perhaps unspoken, engagement to hold the property for their benefit.

III. Of course, the testator was free to give these properties to his wife; but that he did so is not shown; and such a gift can only be established by "evidence in addition to that derived from the execution of the instrument conferring the gift." *Weller v. Weller*, 44 *Hun*, 176. The defendants can make good their claim to the properties in suit, only by showing affirmatively that the testator at the time he conferred the title to them upon his wife, understood fully the nature and effect of his act, and clearly intended that his act should operate as an absolute gift of the properties to her, and that she herself used no unfair means to produce such intention in him; or in the alternative, that she did not, in finally claiming a fee simple in the properties, seek to obtain or retain an advantage that her husband did not intend to confer and that she was not entitled to retain in equity or good conscience. These proofs she has not made, and cannot make. An absolute gift requires a renunciation by the donor, and an acquisition by the donee, of all interest in, and title to the subject of the gift. A portion cannot be retained, and the remainder disposed of. And nothing could be plainer than that, neither the testator nor the defendant intended or contemplated that he had renounced, or that she has acquired an unqualified interest in, and title to these properties. *Curry v. Powers*, 70 *N. Y.*, 217; *Rosenburg v. Rosenberg*, 40 *Hun*, 93 (and cases cited).

IV. And in this view, that the burden was upon the

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defence to show that the properties were gifts from Mr. to Mrs. Pinckney, etc., there was no evidence whatever produced at the trial to support the findings, to the effect that the testator caused the respective houses named in said findings to be conveyed to his wife "in fee simple absolute." Gift cannot be made to rest upon the conveyance alone; and the mere deeds are wholly without color in a case such as this. There was never any dispute about the fact of the execution of these deeds, or that Mrs. Pinckney was named as grantee in them. The issues are whether or not the donor, Mr. Isaac L. Pinckney, who bought and paid for the properties, fully understood and appreciated the legal effect of his wife's being so named as grantee in these conveyances; whether or not he intended in causing her to be so named as grantee, that she should acquire the full legal and equitable titles to the properties "in fee simple absolute;" whether or not if he so understood and so intended, such intention was fairly and justly produced; and whether or not if he intended to reserve any interest in the said property, his widow is now giving effect to such intention, or is acting unconscionably in claiming rights that he had no purpose of conferring. Upon these issues, the affirmative lay with the defendants, and no evidence having been adduced to show what were the transactions that resulted in Mrs. Pinckney's being named as grantee in these deeds, there is no evidence to support the findings enumerated, and therefore the exceptions to such findings must be sustained. Nay, more, Mr. Pinckney having beyond dispute attached some reservation to the conveyance of the properties to his wife, it is, in itself, an abuse of confidence for her, now that death has sealed his lips, to maintain silence as to her transactions with him.

V. The facts sufficiently show: (1.) That Isaac L. Pinckney did not intend to part with, and did not, in fact, part with all his estate in these properties in causing them to be conveyed to his wife; (2.) That he did

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not intend that the conveyances of these properties to his wife should operate as absolute gifts of the same to her ; (3.) That, if the conveyances be construed as operating to this effect, then he did not fully understand the nature of his act in causing the conveyances to be so made ; (4.) That, in so far as the husband intended to qualify the gift and attach a limitation to it, he was reposing a trust in his wife, which was begotten of a generation's length of fond and confidential relations with her ; (5.) That, if his widow now claims inconsistently with this limitation upon her husband's gifts, she is claiming a benefit that he did not know he was conferring, and did not intend to confer ; and (6.) Such a claim by her involves an abuse of her husband's confidence in her as his wife ; wanting which, the conveyances would never have been made ; and, as such, it contravenes equity and good conscience. When the testator made his will, he intended that all he then had, and he and his wife both considered that the properties in suit were his, should be equally subjected to its provisions. And the acceptance by his wife of the trust, provisions of, and executorship and trusteeship under, this will, and her subsequent conduct under the will in treating all the properties as one entire estate, derived from the testator, establish her assent and make her a party to an understanding and agreement with her husband, the terms of which are declared in his will, and set forth in the complaint. And a court of equity will interfere to exact the utmost good faith (*uberrima fides*) in the fulfillment by her of this agreement in order to prevent her taking any undue advantage of the unlimited affection, duty and confidence of her husband. Such an interposition is not intended to prevent an act of bounty, nor is the natural influence flowing from such relations discountenanced by the court, but it is an inseparable condition that this influence should be exerted for the benefit of the person subjected to it, not

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Respondent's points.

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for the advantage of the person possessing it, and the latter must show that a reasonable use has been made of that confidence, and that no unconscionable advantage has been taken. The judgment should be reversed and the conveyances to Mr. Pinckney of the properties described in the complaint should be decreed not to have been intended by the testator as absolute gifts to her, but as conveyances to the use of himself and herself for their lives in joint tenancy, with remainder to his and her children in fee, and the properties should be settled to the uses limited in his will.

*Samuel L. Gross*, attorney in person, and *Hon. Samuel Jones* of counsel, for respondent Gross, argued:—

I. There is no testimony whatever in the whole case that Henrietta Pinckney ever admitted to any one that the 38th street house, the 39th street house, the 40th street house and the 73d street lot, or either of them, belonged to the estate of Isaac L. Pinckney, or that she held either of them upon any trust whatever. The only apparent attempt to show such an admission was made by Victoria P. Watson, one of the plaintiffs, who, when testifying relative to Plaintiff's exhibit B, not signed or subscribed, said that Henrietta Pinckney told her when she handed her exhibit B that there were two houses in 39th street which belonged to the estate of Isaac L. Pinckney. If Henrietta Pinckney did make that statement, she, of course, referred to the house on the northwest corner of 39th street and 3d avenue, and the house adjoining it on the rear, both of which are on 39th street, and both of which did then and do now belong to the estate of Isaac L. Pinckney. The house in 39th street, which was owned by Henrietta Pinckney individually, and which is called in the complaint the 39th street house, adjoins the two houses above mentioned. There is absolutely no evidence in the case of any undue

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or other influence or act on the part of Henrietta Pinckney calculated to induce the making to her of the deeds of the properties called in the complaint the 38th street house, the 39th street house, the 40th street house and the 73d street lot, or either of them. Nor is there a particle of evidence which tends to show that Isaac L. Pinckney was a man who would be likely to be improperly or easily influenced.

II. Henrietta Pinckney, as the executrix of the estate of Isaac L. Pinckney, deceased, having, prior to the commencement of this action, filed her account as such executrix in the office of the surrogate of this county, in which account she charged herself with having received and with then holding the 3d avenue house for the estate of said deceased, all the parties to this action being parties to said accounting proceeding, the surrogate had full jurisdiction in the matter, and the plea in her answer, that said accounting proceeding is a bar to this action in so far as it relates to the 3d avenue house is valid and effectual. *Code of Civil Procedure*, § 2472; *Lewis v. Maloney*, 12 *Hun*, 207; *Rogers v. King*, 8 *Paige*, 210; *Schuehle v. Reiman*, 86 *N. Y.*, 270.

III. The Seventy-ninth street house having been conveyed to Henrietta Pinckney in exchange for the Thirty-eighth street house, it stands in the place of the Thirty-eighth street house, and in so far as the title of Henrietta Pinckney is concerned, it needs no independent consideration in discussing this appeal. The only remaining properties which are embraced in this section are the Thirty-eighth street house, the Thirty-ninth street house, the Fortieth street house and the Seventy-third street lot. The facts attending the conveyance of these several properties were such as to bring them squarely within the section of the statute which declares that no trust shall result in such cases. 1 *R. S.*, 728, § 51. *Everett v. Everett*, 48 *N. Y.*, 218, 223; *Garfield v.*

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Hatmaker, 15 *Ib.*, 475, 478; Wheeler v. Reynolds, 66 *Ib.*, 227, 231, *et seq.*; McCartney v. Bostwick, 32 *Ib.*, 53, 59; Gould v. Gould, 51 *Hun*, 9; Levy v. Brush, 45 *N. Y.*, 589, 595; Hutchins v. Hutchins, 98 *Ib.*, 56; Hurst v. Harper, 14 *Hun*, 280; Cook v. Barr, 44 *N. Y.*, 156; Hoar v. Hoar, 48 *Hun*, 314; Hubbard v. Sherp, 11 *N. Y. State Rep.*, 802; Kimball v. Grauw, 9, *Ib.*, 339; Schmidt v. Schmidt, 48 *Supr. Court (J. & S.)* 520; Sturtevant v. Sturtevant, 20 *N. Y.*, 39. 1 *R. S.*, 728, § 51, *supra*, is as follows, viz.: "Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as alienee in such conveyance subject *only* to the provisions of the next section. The next section, 52, referred to in section 51, provides that a trust in such cases shall result in favor of creditors to the extent that may be necessary to satisfy their just demands.

IV. Even if a parol promise is made to reconvey or to hold to one's use as alleged in the complaint it is not allowed to contravene the express terms of the statute, but is absolutely void in law and equity. Wheeler v. Reynolds, 66 *N. Y.*, 227; Schmidt v. Schmidt, 48 *Supr. Court (J. & S.)*, 520; Gould v. Gould, 51 *Hun*, 9. In Gould v. Gould, *supra*, the husband paid the purchase money and caused the deed to be made to his wife, she *promising to convey to him upon request*, and after such conveyance to the wife the husband managed the property and expended about \$2,000 in improvements thereon. The parties subsequently separated and the husband brought an action to compel a conveyance by his wife to him. The complaint was dismissed and the judgment affirmed by the general term. BARKER P. J., writing the opinion, held that the deed vested in the wife the fee-simple of the land and that her promise to

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reconvey was not binding on her either in law or equity. In *Schmidt v. Schmidt*, *supra*, it was held, FREEDMAN, J., writing the opinion, that where lands were bought in the name of the wife with the joint funds of the husband and wife, no trust could be enforced in favor of the husband without proof of some *wrong* or *fraud* committed by the wife. That if there was an express contract that the husband should have some interest in the lands it would be void under the statute of frauds.

V. The contention of the plaintiffs is that it was the intention of Henrietta Pinckney and her husband that she should in fact acquire no rights whatever under the deeds to her of the said several houses and lot, and they seek to establish this by parol. If such were in fact the intention of Henrietta Pinckney and her husband it cannot be made effectual by parol under the statute, and the authorities cited. RAPALLO, J., in his opinion in *Hutchins v. Hutchins*, *supra*, says on page 63: "It has never been held that a deed can be so far contradicted by parol as to show that it was not intended to operate at all or that it was the intention or agreement of the parties that the grantee should acquire no rights whatever under it, or that he should reconvey to the grantor on his request without any consideration." Nor can parol evidence be resorted to for the purpose of supplementing or aiding the proof furnished by written admissions. *Cook v. Barr*, *supra*. EARL, Com., in *Cook v. Barr*, on page 160, says: "The parol evidence and the acts of the parties show clearly the alleged trust, but these cannot be resorted to to help out the proof furnished by the writing. The writing must show that there is a trust and what it is, and failing in this it is insufficient." And again on page 161, he quotes as follows from 1 *Hilliard on Real Property*, 4th ed., 425: "A trust cannot be established by parol evidence, even though this goes to confirm other written evidence." The parol evidence offered by the plaintiffs would not

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therefore avail them even if it tended to establish the claim alleged. But it does not tend to establish the alleged claim. All the declarations of Henrietta Pinckney upon the accounting and in her deposition upon the trial of this case are that the several properties are and always have been her absolute property, and the same is true of her written declarations. The same is also true of the written declarations of her son Charles.

VI. Fraud alone will avoid the express terms of the statute, and fraud will not be presumed in favor of a husband as against a wife. *Schmidt v. Schmidt, supra*; *Gould v. Gould, supra*; *Garfield v. Hatmaker, supra*; *Hoar v. Hoar*, 48 *Hun*, 314. A refusal to perform a parol promise to recovery or to hold to one's use even when affirmatively shown to have been made, does not constitute fraud. *Gould v. Gould, supra*. Indeed, if a refusal to perform a parol promise to reconvey upon request, or to hold to one's use, would take a case out of the statute, the statute would be absolutely null.

VII. Fraud must be alleged and proved by the party seeking to take advantage of it. *Bailey v. Ryder*, 10 *N. Y.*, 363. There is no evidence whatever in this case, of the slightest semblance of fraud on the part of Henrietta Pinckney. Nor can the appellants succeed upon this appeal on the ground of "part performance." The court will not lend its assistance on the theory of part performance unless the terms and conditions of the alleged agreement which the court is asked to enforce, are first satisfactorily proven or made distinctly to appear to the court by competent evidence, so that the court is not left to spell out or infer by the acts of the parties, or otherwise, that an agreement had been made and what its terms might be. *Parkhurst v. Van Cortlandt*, 1 *Johns. Ch.*, 273; *Steere v. Steere, supra*; *Stanton v. Miller*, 58 *N. Y.*, 192. The only acts of Henrietta Pinckney which are urged to be in part performance of the alleged but unproven agreement are her

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acts in mingling the receipts from the estate of Isaac L. Pinckney of which she was executrix, with her receipts from her individual properties, viz., from the 38th street house, the 39th street house, the 40th street house and the 73d street lot. It is shown by the testimony of Henrietta Pinckney that the said receipts were mingled by her for the sole reason that "it was more convenient." All the income from the estate of Isaac L. Pinckney belonged to Henrietta Pinckney absolutely under the will. No one can assign any good reason why she should keep this income separate from other income which belonged to her under other instruments, and except in one or two instances, if at all, can it be said that any of the principal of the estate of Isaac L. Pinckney was mingled with the incomes and those only temporarily. These acts of mingling did not effect a change of ownership in the properties mingled, nor indicate anything as to the ownership of them. *Fitch v. Rathbun*, 61 *N. Y.*, 579; *Sherman v. Elder*, 24 *Ib.*, 381. Much less could such mingling be held to indicate anything as to the ownership of the principal of the two estates which consists solely of real estate.

VIII. The foregoing cited cases establish beyond any chance for discussion that the title of the 38th street house, the 39th street house, the 40th street house and the 73d street lot was conveyed to Henrietta Pinckney, in fee simple absolute, and that said houses continued to remain so up to the time of her death, unless subsequent to such conveyances to her, she created some interest therein in some one else. It has already been shown that there have been no part performances. (a.) No interest in any one else could be created, unless by act or operation of law or by some instrument in writing, subscribed by the said Henrietta Pinckney, 2 *R. S.*, 135, § 6; *James v. Patten*, 6 *N. Y.*, 9; *Wheeler v. Reynolds*, *supra*; *Levi v. Brush*, *supra*; *Hutchins v. Hutchins*, *supra*; *Cook v. Barr*, *supra*; *Dillaye v. Greenough*, 45

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*N. Y.*, 438 ; *Steere v. Steere*, 5 *Johns. Ch.*, 1 ; *Hubbard v. Sharp*, 11 *N. Y. St. Rep.*, 802 ; *Kimball v. DeGrauw*, 9 *Ib.*, 339. 2 *R. S.*, 135, § 6, is very explicit and is as follows, viz. : “ No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized in writing.” The word “subscribed” used in the statute, 2 *R. S.*, 135, § 6, *supra*, means written underneath or at the end of such writing. *James v. Patten*, *supra*. No such writing so subscribed has been produced, and Henrietta Pinckney in her testimony expressly declares that said houses and lot were and always had been her separate and absolute property, and that there is not and has not been any trust in relation to them. (b.) And the trust so created or declared must not only be in writing and subscribed by the party, but it must be explicit as to its nature and terms. *Dillage v. Greenough*, *supra* ; *Steere v. Steere*, *supra*. KENT, Chancellor, in his opinion in *Steere v. Steere*, says, on page 11 : “ To take the case out of the statute of frauds the trust must appear in writing under the hand of the party to be charged with absolute certainty as to its nature and terms before the court can undertake to execute it.” And on page 13 of same case : “ Parents will usually make declarations and express intentions of holding their property for their children, but a technical trust would not easily be deduced from them unless they were contained in a last will and testament made on purpose to dispose of the estate. It would be injurious to that freedom of intercourse and to the operation of those kind and generous affections which ought to be cherished in the circle of the domestic connections, to make such

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deductions from loose and general expressions, in a confidential correspondence between one member of a family and another, and to give them the force and rigor of legal obligations. Nothing answering the foregoing requisites appear in the case at bar.

IX. The plaintiffs having utterly failed to prove either the agreement or the part performance alleged in the complaint, or any cause of action whatever, now ask the court to hold that the burden of proof has "shifted," and that it is incumbent upon the defendants to prove affirmatively that they, the plaintiffs, are not entitled to any relief. This is an ingenious theory, but it is not the law as we understand it. If this position of the plaintiffs were sound, it would be impossible for a husband to make a gift to his wife which his children might not deprive her of after his decease.

*A. H. Ammidown*, for respondents Pinckney, argued :—

I. To establish a trust (in lands) the evidence must all be in writing and sufficient to show that there is a trust and what it is. Parol evidence cannot be resorted to for the purpose of supplementing or aiding the proof furnished by written admissions. *Cook v. Barr*, 44 *N. Y.*, 156; *Wheeler v. Reynolds*, 66 *Ib.*, 227.

II. There can be no resulting trust in favor of the husband where he purchases lands and takes a conveyance thereof in the name of his wife. *Jencks v. Alexander*, 11 *Paige*, 619; *Brewster v. Power*, 10 *Ib.*, 560; 1 *Rev. St.*, 728, § 51; *Garfield v. Hatmaker*, 15 *N. Y.*, 475; *Nivor v. Crane*, 98 *Ib.*, 40. An oral promise by her to convey to her husband would not be enforced by the court. *Schmidt v. Schmidt*, 48 *Superior Ct.*, 520; *Gould v. Gould*, 51 *Hun*, 9. There is no fraud or undue influence alleged and it appeared none existed. The complaint itself shows there was no fraud or undue influence. *Wheeler v. Reynolds*, 66 *N. Y.*, 227, 235.

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“The wife is presumed to act under the influence of her husband, but it is proper to remark that the husband is never presumed to act under the influence of his wife.”

*Tyler on Infancy and Coverture*, p. 330, citing *City Council v. Roven*, 2 *McCord's (So. Car.) Rep.*, 465. A father's purchase in name of child is presumed an advancement. No resulting trust, *Story's Eq.*, § 309.

III. There would seem to be no evidence to sustain the allegations of the complaint, but certainly there is ample evidence to sustain the defence and it is respectfully submitted that there is certainly no such preponderance of evidence for the appellants as will induce the general term to review the facts. *Hart v. Wilder*, 13 *N. Y., Supp.*, 615; *Spies v. Rome, W. & O. R. Co.*, 15 *Ib.*, 348; *Aldridge v. Aldridge*, 120 *N. Y.*, 614, 617.

IV. There is no instance since the Revised Statutes, certainly, of a trust created by circumstances similar to those in question, the plaintiffs' success would nullify the provisions of the Revised Statutes applicable to such cases and destroy the certainty and security of conveyances of real estate.

PER CURIAM.—The plaintiffs are children and issue of children of Isaac L. Pinckney. Isaac L. Pinckney made his last will and testament and it was admitted to probate in the year 1867. His wife was named as sole executrix, and letters testamentary were issued to her. She was named a defendant in this action. The sixth subdivision of the will is: \* \* \* “I hereby direct that upon the death of said executrix, my real estate, or such part thereof as shall remain unsold, be sold at public or private sale and the proceeds thereof, together with all my property and effects of every nature or description, be divided share and share alike among my children living, or in case either shall have died leaving issue, then the child or children shall take its parent's share.

The object of the suit was to have it adjudged that

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certain pieces of real estate, standing in the name of the widow of Pinckney and the executrix of his will, equitably were part of his real estate when he died. These pieces have been duly conveyed to her by third persons at the request of her husband, he paying the consideration.

As the ground for the relief asked, the complaint alleges, as follows:

IV. That during his life-time and from the date of his intermarriage in or about February 1, 1834, with the said Henrietta Pinckney, the testator lived with her (until his death) in the intimate and confidential relation of husband and wife; and that in course of such relations and by reason of the confidence reposed by the testator in his said wife, the said testator who carried on at said city of New York the business of buying and selling real estate adopted and pursued the course and practice of causing conveyances of such real estate so purchased by him to be made in the name of the said Henrietta Pinckney as grantee; but that it was not the intention of the said testator nor of his said wife, that such conveyances should operate as gifts or grants to the said Henrietta Pinckney, absolutely; but on the contrary thereof it was mutually understood and agreed between the said testator and his said wife, that all such real estate so purchased by him and conveyed to her should be held by her subject to the use, direction and control of the testator during his life-time, and to such appointment, if any, as he might make by his last will and testament; and that after his death, she should stand seized of all such properties as she should not have conveyed pursuant to his directions during his life-time, to the use and benefit of the issue of himself and his said wife in such estates, interests and shares, respectively, as they would be entitled to (the same) in case the said testator had died seized and actually possessed of the same; and that all such grants and conveyances of realty which were so caused to be made

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to the said Henrietta Pinckney by the said testator and more particularly the grants and conveyances of the lands and tenements hereinafter more particularly described were so caused to be made by the testator and accepted by her upon the promise and understanding on her part that she should and would hold the same to the uses and purposes aforesaid.

As to the supposed promise, it was not proved. If it had been proved, it would have been void. This also is true of the so called trust: if you suppose such an oral promise or oral trust to have been made, it would not have been a fraud to refuse to recognize the validity of either. *Levy v. Brush*, 45 *N. Y.*, 589. It is supposed that as the gift was made by husband to wife, there was some presumption of law against the gift which requires the wife to explain something. Conceding this proposition, the wife as a witness called by the plaintiffs, and corroborated by probabilities, and extrinsic circumstances, proved that her husband acted voluntarily without influence from her. The inference from the whole testimony is that he did intentionally what he did, meaning that it should have its full legal effect.

The right of the parties as to the Third avenue property are in due course of administration and adjudication in the Surrogate's Court, and there is no occasion for this court to proceed here if it would be legal to proceed under the circumstances.

Judgment affirmed, with costs.

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Opinion PER CURIAM.

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GEORGE R. BURROWS, APPELLANT v. THE ATLAS  
STEAMSHIP COMPANY, RESPONDENT.

*Trial—Effect of a request by both sides for direction of verdict by the judge upon the testimony.*

In an action to recover damages for alleged wrongful discharge, each side at the conclusion of the evidence moved for the direction of a verdict in its favor. The trial judge thereupon directed a verdict in favor of the defendant. *Held*, that the request of each side operated to give the judge the office of the jury, and that as the evidence was not conclusively in favor of the plaintiff, the disposition of the case by the trial judge was final.

Before SEDGWICK, Ch. J., and McADAM, J.

*Decided May 2, 1892.*

Appeal by plaintiff from a judgment entered upon the verdict of a jury directed by the trial court, and from an order denying a motion for a new trial upon the minutes.

The action was brought to recover damages for the alleged wrongful discharge of plaintiff from defendant's employ before his term of service had expired. The defence was that plaintiff had been guilty of acts of misconduct and insubordination which justified his discharge.

*Frederick Ingraham*, attorney, and *James W. Treadwell* of counsel, for appellant.

*Cary & Whitridge*, attorneys, and *Edwin T. Rice, Jr.* of counsel, for respondent.

PER CURIAM.—There were no errors of law made during the course of the trial. At the end of the testi-

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mony each side asked that a verdict be directed in its favor. This gave to the judge the office of the jury. The evidence was not conclusively in favor of the plaintiff, and the finding of the judge for the defendant was final.

Judgment and order appealed from affirmed, with costs.

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GEORGE C. JOHNS, APPELLANT v. THE PRESS  
PUBLISHING COMPANY, RESPONDENT.

*Libel, publication of, privileged communication, because it was a fair and true report of a judicial proceeding ; plaintiff could only recover upon affirmative proof of malice.*

*Held*, that aside from *ex parte* petitions and the like, any publication made in the ordinary course of judicial proceedings is privileged if the article be a fair and impartial account thereof. Although the publication may be to the disadvantage of the particular suitor, the paramount advantage to the public fully justifies the end attained. The truth irrespective of motives is a complete justification to a civil action for libel. Every one has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. Such comments are not libellous, however severe in their terms, unless they are written maliciously. Report and comment are two separate and distinct things. A report is the mechanical reproduction of what actually took place. Comment is the judgment passed upon the circumstances reported by one who has considered the same. Fair reports are privileged, while fair comments are no libels at all. Blending the report and comments together does not make the matter libellous if it would not be so if the one was separated from the other. The report in this case is within the protection of privileged publications, and the comments are justified by the facts disclosed. The plaintiff could only recover upon affirmative proof of malice, and there is an entire absence of that essential element in the case.

Before SEDGWICK, Ch. J., DUGRO and GILDERSLEEVE, JJ.

*Decided May 2, 1892.*

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Opinion of McADAM, J.

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Appeal from a judgment entered upon the dismissal of the complaint at trial term and from an order denying the motion of the plaintiff for a new trial.

The following opinion, upon which the judgment and order appealed from were affirmed, was filed by the trial judge on his denial of plaintiff's motion for a new trial.

McADAM, J.—“ Aside from *ex parte* petitions and the like, any publication made in the ordinary course of judicial proceedings is privileged, if the article be a fair and impartial account, thereof. Though the publication may be to the disadvantage of the particular suitor, the paramount advantage to the public fully justifies the end attained. Perhaps the earliest and best expression of the reason of the rule is that contained in the opinion of LAWRENCE, J., in *Rex v. Wright*, 8 *Term R.*, 298, in which it is stated, in substance, that though the publication of proceedings in courts of justice may severely reflect on individuals, yet such publications, if they contain true accounts, are not libels,—not the subjects of actions, because it is of great importance that the proceedings of courts of justice shall be known; that the general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the person whose conduct may be the subject of the proceedings; or, as POLLOCK, C. B., said in *Ryalls v. Leader*, *Law Rep.*, 1 *Ex.*, 299, ‘one ought to make as wide as possible the right of the public to know what takes place in any court of justice, and to protect a fair *bona fide* statement of the proceedings there.’

“ There was a judicial hearing and inquiry had in the present case in open court, and the public had the right to know all about it. The policy of the State is tersely expressed in these words: ‘Every citizen may freely speak, write and publish his sentiments on all

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subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press.' *Const.*, Art. 1, § 8.

"This is the supreme law of the land, and contains as noble a sentiment as was ever penned by man.

"The truth, irrespective of motives, is a complete justification to a civil action for libel. In criminal prosecutions the accused is obliged to go a step further, and prove that the publication was made with good motives and for justifiable ends. *Id.* This to prevent breaches of the public peace. Nor is a defendant by pleading the truth in justification, although the plea be unsustained by proof at the trial, to have that circumstance considered by the jury as evidence of malice, or to enhance the damages (*Klinck v. Colby*, 46 *N. Y.*, 427) unless it be interposed in bad faith (*Holmes v. Jones*, 121 *N. Y.*, 461) and the circumstances warrant that conclusion.

"Every one has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. Such comments are not libellous, however severe in their terms, unless they are written maliciously.

"While the law justifies honest reports and comments, it will not permit one, under the guise of reporting proceedings, to use the dagger of malice, the assassin of character, to circulate falsehood, whose only office is to injure and destroy.

"Report and comment are two separate and distinct things. A report is the mechanical reproduction of what actually took place. Comment is the judgment passed on the circumstances reported, by one who has applied his mind to them. Fair reports are privileged, while fair comments are no libels at all. Blending the report and comments together does not make the article libellous, if it would not be such if the one were separated from the other. A careful reading of the article

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complained of, in connection with the pleadings in the action commented upon, in the light of the evidence given by the plaintiff on this trial, proves that the article is a fair report, and that the comments are substantially true. The report is, therefore, within the protection of privileged publications, and the comments are fully justified by the facts disclosed. The comments being true, are not libellous, and the report being privileged, the plaintiff could only recover upon affirmative proof of malice, and there is an entire absence of that essential element in this case.

“Where the publication is not privileged, a different rule prevails, and malice may be implied from the mere falsity of the charge, but where the communication is privileged, it rebuts the *prima facie* inference of malice, and throws upon the plaintiff the burden of proving malice in fact. Reference to the language of the article, and to the facts in the pleadings and evidence confirming its accuracy, has been intentionally omitted, as it might prove as offensive to the plaintiff as the article itself—perhaps more so.

“There has been a tendency in some cases to limit the power of the court to the decision of the question whether the article complained of is privileged, and requiring the submission to the jury of the question whether the defendant fairly and properly conducted himself in the exercise of it; but the evidence in this case so clearly shows the absence of misconduct, that the action admits of only one result, and that a verdict for the defendant. The English cases hold that it is only when the judge is satisfied that the publication cannot be a libel, and that if it is found by the jury to be such, their verdict will be set aside, that he is justified in withdrawing the question from their cognizance. Per KELLY, C. B.; *Cox v. Lee*, *L. R.*; 4 *Exch.*, 288; *Hart v. Wall*, 2 *C. P. D.*, 146.

“The article here complained of is not susceptible of

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a double meaning—one innocent, and the other libellous, and the action does not fall within the rule requiring the jury to determine whether the article is libellous or not.

“The rule applicable is that where, upon the whole evidence, a verdict in favor of a plaintiff would be set aside as against evidence, it is the duty of the court to grant a nonsuit. *Neurendorff v. World M. I. Co.*, 69 *N. Y.*, 389. This is such a case.

“No injustice was done to the plaintiff, his complaint was properly dismissed, and the motion for a new trial must be denied.”

*Smith, Bowman & Close*, attorneys, and *Artemas B. Smith* of counsel, for appellant.

*Lowrey, Stone & Auerbach*, attorneys for respondent.

PER CURIAM.—Judgment and order affirmed upon the opinion of the learned trial judge.

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HENRY BISCHOFF, RESPONDENT v. THE NEW  
YORK ELEVATED RAILROAD COMPANY,  
ET AL., APPELLANTS.

*Elevated railroad, evidence as to benefits from—When easements appurtenant to rear portion of building not cut off by intervening wall on ground floor—Evidence as to effect of railroad upon other property, when dissimilarity of such property not material—Direct evidence of damage from the railroad—Recovery of rental damage during remaining period of lease outstanding at date of plaintiff's purchase.*

In an action to secure an injunction and incidental damages against an elevated railroad with respect to premises on Park Row, the trial judge refused to find at defendants' request that the station in Park Row near

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plaintiff's premises and the great number of people drawn thereby to the vicinity of plaintiff's premises constituted a special benefit thereto from the same. *Held*, no error. The request involved a question of fact whether the persons drawn into the vicinity of plaintiff's premises were likely to become customers at the same, which fact further depended on the occupations, means, and places of home and business of the passers-by. The refusal of the judge to find upon this question of fact cannot be disturbed.

A portion of the premises in suit, known as No. 20 Duane street, is not so cut off from the advantage of light and air from Park Row by solid separating walls without openings as to deprive such portion of easements in Park Row, the first floor of No. 20 Duane street being the continuation of a floor in No. 1 Chambers street. Beyond this, No. 20 Duane street in its front had an easement which was not limited to Duane street but extended easterly to Park Row.

The plaintiff put in evidence the rents of Sweeny's hotel, situated on Park Row, a short distance from plaintiff's premises, from 1879 to the time of the trial. The defendants objected to this evidence as indefinite, irrelevant, and not within the issues in this action. *Held*, that it was within the scope of the action to ascertain what the effect of the railroad had been upon Park Row either in decreasing or increasing rental or fee values. There was no special objection taken because the rent was a matter of bargaining between others than the parties to this suit. For want of a particular objection, the action of the court should be sustained. The dissimilarity of the hotel from the premises in suit in respect of structure and kind of occupation, was immaterial to the inquiry of whether, in a course of years, rents on Park Row had increased or decreased.

The plaintiff called as a witness one Harnett, who testified as to the values of real estate. On cross-examination, he was asked by defendants' counsel, can you give the value of Mr. Bischoff's building? The answer was, that he supposed the building to-day would sell for about \$60,000 or \$65,000. He further testified that another building in Park Row sold for \$85,000, and that plaintiff's building was a little larger than the other. Defendants' counsel then asked: "Q. Is it on account of the difference in the building that you make the \$25,000 difference." The answer was "I make the damage the elevated railroad has done." On re-direct examination plaintiff's counsel asked: "Q. In estimating for counsel for defendants you said you allowed so much for damage from elevated road to plaintiff's property. How much did you allow?" "The question was objected to as asking for the opinion of the witness as to the damage. The court also asked: "How much did you allow in the estimate already given." The witness answered, "I stated from \$60,000 to \$65,000. I figured the damage done from \$30,000 to \$35,000. In other words, I think the property would sell for \$100,000, if put up at auction to-day, if the elevated road was not there. That is the way I made up

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Opinion PER CURIAM.

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my estimate." The defendants' counsel asked that the latter part of the answer be stricken out, as irresponsible and incompetent. *Held*, that the plaintiff could not properly be prevented asking the particulars of the evidence drawn out by the defendants. There was no new subject alluded to. He had already given in substance what he believed the property to be worth without the railroad, for he said it was worth then \$60,000 to \$65,000 and \$25,000 damages had been done. His last answer increased the amount. That would afford matter for observation upon the witness' testimony, but would not make the testimony incompetent. Whatever the purpose of the defendants in asking the question, the plaintiff had a right to examine to frustrate that purpose if possible. And a failure on the part of the plaintiff to accomplish this would not make questions they had asked incompetent.

At the time the plaintiff purchased the premises in 1884, there was an outstanding lease on the premises which had still three years to run. *Held*, that it was proper to award the plaintiff rental damages during that period.

Before SEDGWICK, Ch. J., DUGRO and GILDERSLEEVE, JJ.

*Decided May 9, 1892.*

Appeal by defendants from a judgment entered upon the decision of a judge at special term. The action was brought to secure an injunction and incidental damages against the defendants' elevated railroad with respect to the plaintiff's premises in Park Row.

*Davies & Rapallo*, attorneys, and *Brainard Tolles* of counsel, for appellants.

*Peckham & Tyler*, attorneys, and *W. G. Peckham* of counsel, for respondent.

PER CURIAM.—The action is to restrain defendants from maintaining their elevated road and from running their cars thereon in front of plaintiff's premises.

It is argued for the appellants, that the judge incorrectly refused to find as requested in the 50th and 51st proposed findings of fact. These are: There is a station of defendants' railroad near plaintiff's premises, which

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Opinion PER CURIAM.

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is daily used by great numbers of people, some of whom pass through Park Row in front of plaintiff's premises, and the existence of station and railroad and the great numbers of people thereby drawn to the vicinity of the plaintiff's premises constitute a special benefit to said premises. The first request has no importance. It relates to some people. That some people passed the plaintiff's premises could not affect the value of those premises. Whether great numbers of people being drawn to the vicinity of plaintiff's premises would constitute a special benefit to them, would depend upon the likelihood of their becoming customers at plaintiff's premises or perhaps purchasers of them. Whether there would be such advantage would again depend upon the occupations, means, and the places of the homes and business, of the passers-by. The question is of fact for the judge and his refusal to find should not be disturbed. This is perceived in the description of the crowds, candidly given by the counsel for the appellants. He says: "Great numbers of persons employed in the factories, warehouses and places of business in this part of the city use these stations every day and usually pass through some portion of Park Row in going to or from the station."

The learned court took into consideration fully the advantages or benefits conferred on the property by the railroad. And except, in rare cases, it is always done wherever the market value of the abutting land is proven, for the advantages, general or special, have gone into the land and affected its value.

The counsel for the defendants asked that this finding of fact be made. It was "62nd. The portion of plaintiff's premises, known as No. 20 Duane street, constitutes a separate building with a separate entrance, separate walls and no frontage on Park Row. No easements over Park Row are appurtenant." The evidence does not seem to show that between the two so-called

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Opinion PER CURIAM.

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separate buildings there is any separating wall so solid and without openings that the Duane street building is cut off from the advantages of light and air that are derived from Park Row. At one time the easements from Park Row were appurtenant to the Duane street part of the property. So far as the latter is concerned there is no proof that it has been extinguished. The relation of the buildings is such that, for instance, the first floor of 20 Duane street is a continuation of a floor in No 1 Chambers street. Beyond this No 20 Duane street, in its front, had an easement which was not limited to Duane street but extended easterly to Park Row. The judge would not have been justified in finding as requested. *Stevens v. The N. Y. El. R. R. Co.*, 28 *N. E. R.*, 667.

The plaintiff was allowed to prove what had been the rents of Sweeny's hotel, from 1879 to the present time. That hotel was a short distance from the plaintiff's house. Questions on this subject were objected to on the ground that they were indefinite and irrelevant and did not relate to the premises in question and were not within the issues in this action. It was within the scope of the action to ascertain what the effect of the railroad had been upon Park Row, either in decreasing or increasing rental or fee values. There was no special objection taken because the rent was a matter of bargaining between others than the parties to this suit. In these suits evidence is often allowed without objection upon a direct examination. For want of the particular objection, the action of the court should be sustained. The dissimilarity of the hotel from the premises in suit in respect of structure and kind of occupation was immaterial to the inquiry of whether in a course of years rents on Park Row have increased or decreased.

The plaintiff called as a witness one Harnett, who testified as to the values of real estate. On cross-examination he was asked by defendants' counsel, Can you

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Opinion PER CURIAM.

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give the value of Mr. Bischoff's building? The answer was that he supposed the building to-day would sell for about \$60,000 or \$65,000. He further testified that another building in Park Row sold for \$85,000, and that plaintiff's building was a little larger than the other. Defendants' counsel then asked: Q. "Is it on account of the difference in the building that you make the \$25,000 difference?" The answer was, "I make the damage the elevated railroad has done." On re-direct examination plaintiff's counsel asked: Q. "In estimating for counsel for defendants you said you allowed so much for damage from elevated road to plaintiff's property. How much did you allow?" The question was objected to as asking for the opinion of the witness as to the damage. The court also asked, How much did you allow in the estimate already given? The witness answered, "I stated from \$60,000 to \$65,000. I figured the damage done from \$30,000 to \$35,000. In other words I think the property would sell for \$100,000, if put up at auction to-day, if the elevated road was not there. That is the way I made up my estimate." The defendants' counsel asked that the latter part of the answer be stricken out, as irresponsive and incompetent. The plaintiff could not properly be prevented asking the particulars of the evidence drawn out by the defendants. There was no new subject alluded to. He had already given in substance what he believed the property to be worth without the railroad, for he had said it was worth then \$60,000 to \$65,000 and \$25,000 damage had been done. His last answer increased the amount. That would afford matter for observation upon the witness' testimony, but would not make the testimony incompetent. Whatever the purpose of the defendants in asking the question, the plaintiff had a right to examine to frustrate that purpose if possible. And a failure on the part of plaintiff to accomplish this would not make questions they had asked incompetent.

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Statement of the Case.

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The reduction of rent on an outstanding lease was not negligent or without cause. The plaintiff testified that he could not get the rent from the tenant in its full amount, and therefore he lowered it to \$60 a month. The judge was justified in finding that the plaintiff's action was due to business expediency or necessity, in endeavoring to get the largest rent that could be got.

The action of the judge in giving damages from 1884, when the plaintiff acquired the property, and through three years of a then pending lease, is in accordance with the decision of *Korn v. The N. Y. El. R. R. Co.*, 15 *N. Y. Supplement*, 10.

Other exceptions have been examined and do not call for a reversal of the judgment.

Judgment affirmed, with costs.

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RUDOLPH RANNOV, APPELLANT v. EDWARD C.  
HAZARD, ET AL., RESPONDENTS.

*Practice*—Notice of appeal from an order must state the substance of the order correctly.

On the 30th day of April, 1892, an order was duly entered in this action (*ex parte*) declaring the plaintiff's "*case on appeal*" abandoned. The plaintiff obtained an order to show cause why the order of 30th of April declaring "*the appeal*" abandoned should not be vacated. This motion was heard by Judge MCADAM, and on the 23d day of May, 1892, an order was entered denying the motion to vacate the order of April 30th. The plaintiff served a notice of appeal from an order denying a motion to vacate an order declaring the "*appeal herein*" abandoned, and this is the appeal before the court.

*Held*, there was no such order granted as the notice of appeal described (declaring the *appeal* abandoned). The original order of April 30, 1892, declared *the case on appeal* abandoned, which left the plaintiff free to prosecute the appeal on the judgment roll. This order was duly made and entered, and has not been appealed from. There was no order made

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Opinion of the Court, by FREEDMAN, J.

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In this action declaring the *appeal* abandoned, and no order entered denying a motion to vacate such an order.

*Held also, on the merits*, that the plaintiff had not sufficiently excused his default.

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

Appeal from an order denying plaintiff's motion to vacate an order declaring case on appeal abandoned.

*Frederick Hemming*, attorney, and *Waldorf H. Phillips* of counsel, for appellant.

● *Hugh Porter*, attorney and of counsel, for respondents.

BY THE COURT.—FREEDMAN, P. J.—Plaintiff's motion was to vacate the order declaring the appeal abandoned. There was no such order. The order of April 30, 1892, declared the case on appeal abandoned which left the plaintiff free to prosecute his appeal upon the judgment roll. It was duly made and entered and has not been appealed from.

Aside from these considerations the plaintiff was bound, upon the motion to vacate the order as entered, to sufficiently excuse his default, but upon this point the affidavits submitted by both parties presented a conflict which was determined in favor of the defendants. Under all the circumstances disclosed we cannot say that the plaintiff established the point by a preponderance of evidence.

The order denying the motion to vacate should, therefore, be affirmed, with \$10 costs and disbursements.

DUGRO and GILDERSLEEVE, JJ., concurred.

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Statement of the Case.

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SAMUEL J. KNIGHT, AS PRESIDENT, ETC., APPELLANT v. SACKETT & WILHELMS LITHOGRAPHING COMPANY, RESPONDENT.

*Motion for a new trial—Dismissal of complaint on the merits—Lithographic stones, impressions on same, conversion of.*

The motion for a new trial was made on the minutes of the trial judge, upon the grounds specified in section 999 of the Code, but the trial had been before a judge, without a jury, by consent of parties. Section 999 applies only to jury trials, and the order appealed from must, therefore, be affirmed irrespective of the reasons for which it was made.

The complaint was properly dismissed, because of the failure of the plaintiff to establish a title to the lithographic stones. The action being for conversion, the plaintiff was bound to establish title. The stones must be regarded as the principal, and the impressions thereon as a mere incident, and the plaintiff could not maintain conversion based upon the refusal of the defendant to deliver up the impressions and an offer to pay the value of the stones. A delivery of the impressions cannot be made without giving up the stones also, nor is a mere refusal to permit a transfer to be made of the impressions sufficient to sustain the action. Conversion would only lie upon proof of the destruction of the plaintiff's interest in the impressions. Short of that, and under the special circumstances of this case, the plaintiff's remedy against the defendant is in equity. For these reasons the complaint was properly dismissed; but as the dismissal was upon plaintiff's own showing, and without findings, it should not have been dismissed "*upon the merits*," and the judgment should be modified by striking out the words "*upon the merits*."

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

Appeal by plaintiff from a judgment dismissing the complaint, after trial of the issues by a judge without a jury, and also from an order denying plaintiff's motion for a new trial.

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Opinion of McADAM, J.

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The facts and points in this case appear fully from the following statement and opinion of the trial judge, the points of counsel, and the opinion of the court.

“The plaintiff entered into a contract with the Hatch Lithographic Company, by which the latter was to perform services in making lithographic drawings or impressions on stone, from which prints or colored lithographs were to be printed from time to time for the plaintiff, at agreed prices. The drawings became the property of the plaintiff, while the stones upon which the impressions were made and taken belonged to the Hatch Lithographic Company. While the stones were thus owned, the latter company executed a chattel mortgage thereon, which was foreclosed, and at the foreclosure sale the property was bought in, and eventually found its way into the hands of the defendant. The plaintiff tendered to the defendant the sum of \$247.50, which it claims was the price fixed by the defendant as the value of the lithographic stones upon which the drawings were made and demanded from the defendant the delivery of the drawings, which of course included the stones upon which the impressions were made, for the one could not be delivered without the other; but the defendant refused to comply with the demand, and the plaintiff brought this action in trover as for conversion, claiming \$5,000 damages. The complaint was dismissed upon the ground that the plaintiff had no title to the stones, hence could not maintain conversion. The present is an application for a new trial.

McADAM, J.—“The plaintiff’s counsel at the trial, when asked by what process his client became possessed of title to the stones, replied, ‘By confusion of property;’ but the intermixture in this instance was by the consent of all the parties, so that the owners became tenants in common of the property according to their respective interests (*Cowen’s Treat.*, § 580), and the rule appli-

cable where one unlawfully makes the intermixture, as illustrated by the cases referred to in § 579, *supra*, has no application; nor does the theory of accession of property apply, for the reason that the stones would be regarded as the principal, the impressions a mere incident, and if that rule were applied the title to all would be in the owner of the stones.

“The rule is settled that neither replevin nor trover for conversion will lie by one tenant in common of a chattel against another for taking or disposing of the chattel. The plaintiff in such an action must claim as sole owner, and must stand or fall upon that claim. *Hudson v. Swan*, 83 *N. Y.*, 552.

“The case resembles that of *Dodworth v. Jones*, 4 *Duer*, 201, in which a stereotyper who was employed to prepare stereotyped plates of a ‘copyright’ book, and made them out of materials belonging to himself, and with his own labor, was held entitled to retain the plates, and that he could not be divested of his legal title to the product or plates by a tender, unaccepted, of just compensation for his labor and materials. In that action the court held that the plaintiff, in order to recover, must establish a legal title to the plates, or a special property in them, with the right of actual possession at the time the action was commenced, and added: ‘What remedies might be taken by the plaintiff to prevent a use of the plates by defendant’s firm if it should attempt to print the book it is useless to discuss.’

“The plaintiff had a clear right of action against the Hatch Lithographic Company for any breach of its contract arising from its refusal or inability to carry it out; but it does not follow that such right of action gave to the plaintiff any title to the stones, or any right to their possession. Perhaps the plaintiff might by bill in equity have maintained a suit for the partition of the several rights of property in the stones and the impressions on them, in which the value of the stones might

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Appellant's points.

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have been judicially established and a sale ordered, with directions to pay such value out of the proceeds, and the residue to the plaintiff, in case it had elected to permit such a sale to go on (*Prentice v. Janssen*, 79 *N. Y.*, 478); or the plaintiffs, at said sale, might have purchased the property, and, by paying the value legally fixed upon the stones, acquired title to the stones as well as the impressions; or the defendant might have been directed to deliver up the stones on payment of the value thereof as determined. The plaintiff is seemingly entitled to such relief in an appropriate suit on principles of natural right and justice. This seems to be in accord with the ruling of *Foster v. Ward*, *L. R., Ireland*, vol. 9, pages 446, 468, *Chancery Division*, in which a similar question was decided, as well as with the civil law, and the views of Justinian, to which the attention of the court has been called by counsel.

“Upon the case as presented, and in the absence of proof of usage of the trade in regard to such matters, which might or might not have been available, the complaint was properly dismissed, and the motion for a new trial must be denied.”

*William O. Campbell*, attorney for appellant, argued:—

I. Title to personal property cannot be divested except by the fault or with the consent of the owner. This proposition is so trite that it would seem unnecessary to discuss it. I venture, however, to cite a few authorities. After demand and refusal, trover may be maintained by the true owner against any person, even a *bona fide* purchaser for value. There can be no doubt but that the owner may follow the goods. *Barret v. Warren*, 3 *Hill*, 348. In further support of this proposition it will be sufficient to cite the cases where it has been discussed and maintained. *Hall v. Robertson*, 2 *N. Y.*, 293; *Eli v. Ehle*, 3 *Ib.*, 506; *Wooster v. Sherwood*, 25 *Ib.*, 278

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(citing *Brower v. Peabody*, 13 *Ib.*, 121 ;) *Saltus v. Everett*, 20 *Wend.*, 267 ; 2 *Kent's Com.*, 621 ; *Boyce v. Brockway*, 31 *N. Y.*, 490 ; *Bassett v. Spofford*, 45 *Ib.*, 387 ; *Barnard v. Campbell*, 55 *Ib.*, 456 ; *Gillett v. Roberts*, 57 *Ib.*, 34 ; *Everett v. Coffin*, 6 *Wend.*, 603 ; *Williams v. Merle*, 11 *Ib.*, 80 ; *Hoffman v. Carow*, 22 *Ib.*, 285-294 ; *Prescott v. De Forest*, 16 *Johns.*, 159.

II. Knight, the plaintiff, had title to the pictures on the "key-stones" or "mother-stones." The Hatch Lithographic Co. were bailees only. This proposition can be maintained by the principles of the common law. A very able discussion of almost the precise question involved here will be found in the action of *Foster v. Ward*, *L. R., Ireland*, volume 9, pp. 446 *et seq.* That was a case, as will be seen from the report, where lithographic stones had been prepared by the firm of Marcus Ward & Co., for Mr. Foster, under an arrangement almost identical with the arrangement between plaintiff and the Hatch Lithographic Company. It is sufficient to say that in that case the court awarded the plaintiff the possession of the stones with the drawings on them, and laid down the principle that the only thing necessary for the plaintiff to do was to pay the defendant for the value of the lithographic stone itself. It will be seen by the pleadings that it is admitted in this case that Mr. Knight did offer the Hatch Lithographic Company the value of the stones as fixed by themselves. Mr. Knight swears that the pictures were to remain his. This is not contradicted.

III. The plaintiff, having a property right in the pictures or drawings on the stones, acquired the right to the stones themselves by paying to the defendant the value of the stones. It is admitted that Mr. Knight tendered the value of the stones, and consequently, for the purposes of this discussion, it must be assumed that he has paid for them, there being no objection to the tender. I have been unable to find in this State any

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Appellant's points.

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case which would exactly support the proposition now under consideration, but there is no lack of authority in the civil law and the *Code Napoleon*. It is certainly a monstrous doctrine to maintain that this plaintiff must lose nearly two thousand dollars' worth of drawings or pictures, in the highest degree useful to him, simply because defendant claims title to and will not sell (though tender has been made), \$247.50 worth of stones on which the pictures have been placed. I assume that the court will be swift to find relief for him, even if it must go to the civil law for it. *Inst. Justinian (Sander's Trans.)*, Lib. II., tit. I., § 25: When materials belonging to different persons were mixed together, or one person bestowed his labor on the materials of another, although only one person might be the owner of the product, yet he did not become so at the expense of others. He was obliged to pay those whose materials or labor had been employed the value of their respective materials or labor and was liable to a personal action for the enforcement of the payment. *Inst. Justinian (Sander's Trans.)*, Lib. II., tit. I., § 34; *Gaius Institute*, II., § 77: "If a person has painted on the tablet of another, some think that the tablet accedes to the picture; others, that the picture of whatever quality it may be accedes to the tablet. It seems to us the better opinion that the tablet should accede to the picture; for it is ridiculous that a painting of Appelles or Parrhasius should be but the accessory of a thoroughly worthless tablet. But if the owner of the tablet is in possession of the picture, the painter, should he claim it from him, but refuse to pay the value of the tablet, may be repelled by an exception of *dolus malus* \* \* \* and *vice versa*. \* \* \* If the tablet has been stolen, whether by the painter or any one else, the owner of the tablet may bring an action of theft." *Code Napoleon*, Book 2, § II., Art. 565. The right of accession having for its object two things movable which belong to different masters is entirely

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Appellant's points.

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subordinate to the principles of natural equity. The following rules shall serve as examples to guide the judge in determining cases not provided for according to the peculiar circumstances. *Art. 566.* When two objects appertaining to different masters, which have been united in such a manner as to form one whole, are nevertheless separable, so that one can subsist without the other, the whole belongs to the master of that which forms the principal part on condition of paying to the other the value of the one which was united to it. *Art. 567.* That is to be deemed the principal part to which the other was only united for the use, ornament or completion of the first. *Art. 569.* If, of two objects united in order to form one whole, the one cannot be regarded as accessory to the other, that shall be deemed the principal which is most considerable in value or in size if the value of both is nearly equal. *Art. 570.* If an artisan or any person whatsoever has employed a material which did not belong to him, in order to form something of a new description whether the material can or cannot be restored to its original shape, the proprietor thereof has the right to claim the thing which has been formed from it, on paying the price of the workmanship. *Art. 571.* If, however, the workmanship were so important that it surpassed by much the value of the material employed, the labor shall then be deemed the principal part, and the artificer shall have the right to retain the thing wrought on paying the price of the material to the proprietor. *Art. 572.* Where a person has made use of materials which partly belong to him and partly do not, in order to form an object of a new description, without having destroyed any of the materials, but in such a way that they cannot be separated without inconvenience, the object is common to both proprietors, etc.

IV. One tenant in common can maintain trover as for conversion against his co-tenant. The learned justice says in his opinion, that the owners of the drawings and

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the owners of the stones respectively become tenants in common because of the intermixture of properties by consent, and he continues: "The rule is settled that neither replevin nor trover for conversion will lie by one tenant in common of a chattel against another for taking or disposing of the chattel. The plaintiff in such action must claim as sole owner and must stand or fall upon that claim." The case of *Hudson v. Swan*, 83 *N. Y.*, 552, is cited to support the foregoing statement. If the Hatch Lithographic Company and the plaintiff were tenants in common, then the defendant, The Sackett and Wilhelms Lithographic Company, upon the purchase of the joint property, became a tenant in common with the plaintiff. This is decided in the case of *Fiero v. Betts*, 22 *Barb.*, 633, which declares that a purchaser at a judicial sale of the interest of one tenant in common becomes a co-tenant with the rightful owner of the other share. The sale does not destroy the tenancy in common. Assuming for the sake of argument that the Hatch Lithographic Company and the plaintiff in this action became tenants in common of the lithographic stones with the drawings thereon, and that by purchasing the stones the defendant became also a tenant in common with plaintiff, it is respectfully submitted that there is no such rule in law as that laid down in the opinion and quoted above. The case of *Hudson v. Swan*, *supra*, which is cited in support of that theory, does not in fact decide any such thing. An examination of the case discloses that it was an action of replevin brought to recover the possession of a horse, and the plaintiff set up sole ownership, when in fact he owned but one-half of the horse. All that the opinion of the Court of Appeals decides is that he must stand or fall upon the claim as pleaded, which was that of sole and exclusive ownership. The opinion in that case does hold that one tenant in common cannot maintain replevin against a co-tenant for *taking* a chattel merely, but it does not say that he

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might not maintain replevin if a proper foundation were laid for the action. There can be no question but that the action can under proper circumstances be maintained by one tenant in common against his co-tenant, and it is to a discussion of this question that I wish to invite the careful attention of the court. An examination of the authorities is very instructive and interesting. *Littleton*, 1 *Inst.*, 199, b., § 323, illustrates the rule in his time, when he says: "If two be possessed of chattels personal in common by diverse titles, as of a horse, an ox, a cow, if the one takes the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done the wrong to occupy in common when he can see his time." And Coke, commenting on that passage, approves of it (1 *Inst.* 200, a.). Beginning with the statement of the law as just laid down, there will be found to have been an astonishing advance since that time. In this State it seems to have been formerly the rule that one tenant in common could not maintain trover against his co-tenant for merely dispossessing him, or excluding him from the enjoyment of the chattel, although he might do so if the chattel were destroyed or sold. This principle is upheld in *Fiero v. Betts*, 22 *Barb.*, 633; *Hyde v. Stone*, 7 *Wend.*, 354; *S. C.*, 9 *Cow.*, 230; *Gilbert v. Dickerson*, 7 *Wend.*, 449; *Mumford v. McKay*, 8 *Ib.*, 442; *Farr v. Smith*, 9 *Ib.*, 338; *White v. Osborne*, 21 *Ib.*, 72. I have merely cited these cases with a general statement of what they determine, because later cases, some in the Court of Appeals, have reaffirmed the doctrine with many important additions. In the case of *Van Doren v. Balty*, 11 *Hun*, 239, the defendant Balty had bought a harness and buggy at mortgage sale. Van Doren, the plaintiff, was present at the sale, and forbade the same in the hearing of Balty so far as his one-half of the buggy was concerned. Balty nevertheless bid in the property and afterwards refused to allow Van Doren to

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use the chattel and claimed exclusive ownership of it. We find the court enlarging upon the principle laid down in former cases, quoted above, as follows: "A purchaser of the interest of one tenant in common at a mortgage sale of a chattel with notice of the tenancy becomes equally a wrongdoer with the mortgagor. The sale is a conversion. The purchase and assertion of exclusive ownership is a conversion." The court cites with approval 2 *Hillard on Torts*, 246; *Hyde v. Noble*, 13 *N. H.*, 494; *Parker v. Middlebrook*, 24 *Conn.*, 207. In *Osborne v. Schenck*, 83 *N. Y.*, 201, we reach the full fruition of our hope as we wander through the long list of cases and find this broad principle laid down: "The possession and use of one tenant in common of a chattel, though it prevents the possession and use of the other, can furnish no ground for action, since it is rightful and rests on legal authority. But it also follows that if that possession develops into a destruction of the property or of the interest of the co-tenant, or into such hostile appropriation of it as to exclude the possibility of beneficial enjoyment by him, \* \* \* then a conversion is established."

V. The plaintiff having a title to the drawings, the defendant was guilty of a conversion when it refused to allow a transfer to be taken. And it matters not whether we treat the defendant as tenant in common or as bailee. The taking of a transfer from a lithographic drawing is done by the use of transfer paper, and it would have been a qualified and a somewhat unsatisfactory exercise of plaintiff's right of property to have been compelled to accept a transfer in place of the drawings themselves, but he offered to take the transfer, and he thereby placed the defendant in the wrong. It was a demand, not that the defendant should do something, but that the defendant should allow the plaintiff, at his own expense, to possess himself of his property. All the authorities quoted to sustain Point IV. apply with greater force to this point.

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Respondent's points.

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*Smith, Bowman & Close*, attorneys, and *Artemas B. Smith* of counsel, for respondent, argued :—

I. Appellant had no right to the use or possession of the stones. This proposition is true as between the appellant and the Hatch Lithographic Company. But as against the respondent, the appellant has absolutely no right or claim whatever. There is not a scintilla of evidence that the respondent acquired the stones with a knowledge or notice of plaintiff's claim herein, or of its agreement with the Hatch Lithographic Company. Besides such claim was not made in the complaint or at the trial. Such right to an immediate possession, is essential to the appellant's right to recover for the conversion. *See opinion of the trial judge and authorities cited therein*; *McConihe v. N. Y. & E. R. R. Co.*, 20 *N. Y.*, 495, 497; *Gregory v. Striker*, 2 *Denio*, 629, and cases cited. On this subject the decision of this court in *Dodworth v. Jones*, 4 *Duer*, 201, cited by the judge below, seems clearly to determine this case. We cannot find that that case has ever been questioned or criticised in the many years since it was decided. On the contrary, the doctrine is sustained by other authorities. On the trial the learned counsel for the appellant claimed as a controlling precedent the case of *Foster v. Ward*, 9 *Law Reports, Ireland*, pp. 446, 468. A brief examination of that case will show that it is essentially distinguishable from this case. The contracts in the two cases were entirely dissimilar. In this case the appellant disclaims ownership of the stones. It merely paid for the work of making the drawings or engravings. In *Foster v. Ward*, Mr. Foster paid for both the work and the materials supplied, and thus became the owner of the plates produced (p. 469). A further distinction is, that *Ward & Company*, the defendants in the other case, were the parties with whom *Foster* had made his contract. As that suit was in Chancery, the court had ample power to determine the rights of

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the parties. This case is an action at law, and the Hatch Lithographic Company is not before this court. The appellant's claim that its right to the use or possession of the said stones was acquired by it as an incident to its said arrangement with the Hatch Lithographic Company and its copyrights in the designs engraved upon the stones, is without foundation in law. As above pointed out, the appellant only paid for the work of making the drawings. It made no claim to the ownership of the stones. It never claimed the possession thereof until after the respondent had acquired its interest and possession. Alike untenable is the appellant's claim to the use of the stones as an accession to its copyrights. The copyrights of the designs or pictures engraved on the stones were separate and distinct properties from the stones, and the sale and delivery of the latter to the respondent did not carry with them any of the appellant's rights under its copyrights. *Stevens v. Gladding*, 17 *How. U. S.*, 447, 452.

II. Appellant failed to show that any of its rights had been violated. As above pointed out, the appellant's rights rested upon an agreement whereby certain of its copyrighted designs were put upon stones of the Hatch Lithographic Company for its exclusive use. This arrangement was not for a definite period, and, therefore, either party was at liberty to terminate it at pleasure. Apparently the Hatch Lithographic Company elected to terminate the arrangement when it suffered the stones to be sold under foreclosure proceedings. The appellant makes no complaint of any infringement of his rights in the designs under the copyrights. But if such complaint were made herein it could not avail the appellant, because this court has not jurisdiction of the subject matter of copyrights. *Potter v. McPherson*, 21 *Hun*, 559, 562. Moreover, the transfer of said stones could in no way affect the plaintiff's rights under his copyrights. *Stevens v. Gladding, supra*.

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Opinion of the Court, by FREEDMAN, P. J.

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BY THE COURT.—FREEDMAN, P. J.—The motion for a new trial was made on the minutes of the trial judge upon the grounds specified in section 999 of the Code of Civil Procedure. But the trial had been by a judge without a jury by consent of the parties. The section referred to in express language applies only to jury trials. The order appealed from must, therefore, be affirmed, irrespective of the reasons for which it was made.

Upon the appeal from the judgment it must be held that the complaint was properly dismissed for the failure of the plaintiff to establish title to the stones. The action being for conversion, the plaintiff was bound to establish title. The stones must be regarded as the principal and the impressions as a mere incident. The plaintiff could not acquire title to the stones by a mere offer to pay their value which was refused. The contract of the plaintiff was with the Hatch Lithographic Company, and the latter, and not the defendant, agreed to put upon certain stones certain drawings of the plaintiff and that the impressions were to be the property of the plaintiff and were to be used exclusively for the benefit of the plaintiff. But the Hatch Lithographic Company remained the absolute owner of the stones and was lawfully in the possession of them. It was conceded by the plaintiff that after the making of said contract the Hatch Lithographic Company, while so in possession, mortgaged the stones, that the mortgage was foreclosed, that on the sale the stones were purchased by Fuchs and Lang, and that the defendant purchased from them. It nowhere appears that the defendant-company, at the time it acquired title to the stones, had any knowledge or notice of the arrangement between the plaintiff and the Hatch Lithographic Company.

Under these circumstances conversion cannot be maintained by the plaintiff against the defendant based upon a mere refusal to deliver up the impressions, because a delivery of them cannot be made without giving up the

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stones. Nor is a mere refusal to permit a transfer to be made sufficient to sustain the action. Conversion would only lie, if at all, upon proof of the destruction of plaintiff's interest in the impressions. Short of that, and under the special circumstances of this case, plaintiff's remedy against the defendant is in equity. Moreover, the plaintiff clearly has a good cause of action against the Hatch Lithographic Company for breach of contract.

The authorities cited by plaintiff's counsel have been duly examined, but they do not call for reversal. However true it may be as a general rule of our law of personal property, that no man can be divested of his property without his own consent, and that consequently even a *bona fide* purchaser from a person in the possession of property, who has no title to it and no authority whatever from the owner to sell or dispose of it, cannot acquire any title against the true proprietor, there are in fact numerous exceptions to the rule. Thus the law will in many cases imply an authority from the owner to sell, and where the owner has conferred an apparent right of property upon the vendor, or an apparent right of disposal, and has furnished the vendor with the external *indicia* of such right, and the vendor has sold the goods and delivered the possession thereof, the law will protect a purchaser who has acquired the property for a fair and valuable consideration, in the usual course of trade, and without any notice of any conflicting claim, or of suspicious circumstances calculated to awaken inquiry or to put him on his guard, although the goods were in fact obtained by the vendor from the true owner fraudulently. In the case at bar the difficulty with the claim of plaintiff's company is that the said company saw fit to expend its money for impressions upon stones under a contract with a third party without acquiring title, or the right of immediate possession, to the stones themselves.

For the reasons stated the complaint was properly dismissed, but as the dismissal was upon plaintiff's own

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showing, and without making any findings, it should not have been upon the merits.

The judgment should therefore be modified by striking out the words "upon the merits," and as thus modified affirmed.

The affirmance of the judgment as modified should be without costs upon this appeal, but the respondent may have \$10 costs and disbursements upon the affirmance of the order.

DUGRO and GILDERSLEEVE, JJ., concurred.

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MARTHA G. SEGGERMANN, APPELLANT v. THE  
HILLIS PLANTATION COFFEE COMPANY,  
RESPONDENT.

*Referee, decision of, upon conflict of testimony, must be final.*

In this case the conflict between the witnesses of the respective parties was quite marked, and the result depended upon the credibility of the witnesses in the judgment of the referee. Upon the case as presented on this appeal the court would not be justified in interfering with the decision of the referee on the ground that his findings were against the weight of evidence. Nor is there any merit in the claim that some of the facts found by the referee are not supported by the evidence. The facts being so found from the evidence, they support the conclusion of law based thereon, in conformity with which the judgment was entered.

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

Appeal from judgment entered upon the report of a referee.

Opinion of the Court, by FREEDMAN, P. J.

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*Yellott D. Dechert*, for appellant.

*Campbell & Murphy*, attorneys, and *James Flynn* of counsel, for respondent.

BY THE COURT.—FREEDMAN, P. J.—The facts were determined by the referee upon conflicting testimony. The conflict between the witnesses of the respective parties was quite marked, and the result depended upon the credibility of the witnesses. The referee, in addition to hearing their statements, had the advantage of seeing them and observing the manner in which they gave their testimony. Upon the whole case as presented, the general term would not be justified in interfering with the decision of the referee on the ground that his findings were made against the weight of the evidence. Nor is there any merit in the claim that some facts found by him are not supported by evidence. The facts being as found, they support the conclusion of law based thereon, in conformity with which the judgment was entered.

I have also looked at the exceptions taken by the plaintiff to the rulings of the referee at the trial, but none of them presents ground for reversal.

The judgment should be affirmed, with costs.

DUGRO and GILDERSLEEVE, JJ., concurred.

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Statement of the Case.

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JOSEPH W. LYNCH, ET AL., APPELLANTS v. HENRY  
HUNNEKE, RESPONDENT.

*Injunction—Lease, and agreement to lease, partly in writing and partly by parol—Parol testimony in regard to written documents and in explanation thereof.*

Upon the trial of the issues the trial judge, after hearing part of the testimony offered by the plaintiffs refused to hear the remainder, and dismissed the complaint upon the ground that the lease did not give the exclusive use of the entrance and hallway to the stairway leading to the premises leased to the plaintiffs, and did not prohibit the cutting and use of a door by the defendant, from the hallway into the saloon. This ruling was erroneous, as it was based upon the theory or conclusion of the judge that the lease itself constituted the whole contract between the parties; and that inasmuch as the lease did not in terms grant to plaintiffs the exclusive use and control of said hallway, evidence of a prior or contemporaneous oral agreement concerning said hallway was inadmissible, and so far as such evidence had been permitted to be given it must be disregarded.

The general rule which excludes conversations, negotiations and parol agreements, prior to the execution of a written agreement relating to and springing out of such conversations, negotiations, etc., does not apply to this case. (1) When the original contract, although verbal, yet was entire, and only a part of it was reduced to writing, then all the part not so reduced can be proved by parol. (2) When the consideration, or a consideration further than that expressed in the writing, does not appear in the writing, the consideration or the further consideration may be proved by parol. Parol evidence is always admissible as to the meaning which the parties themselves attached to a particular word or phrase in the contract. Such evidence does not contradict or vary the terms of the written contract, but is simply explanatory thereof.

The lease in question was for six lofts above the first floor, "*together with the appurtenances.*" These words gave to the plaintiffs whatever was attached to or used with the premises as incident thereto, and convenient or essential to the beneficial use and enjoyment thereof, and the plaintiffs took thereby any easement or servitude used or enjoyed with the leased premises; and, as the appurtenances were not specified, parol evidence was admissible to show that the parties, preparatory to the execution of the lease, met and discussed their character and extent, and

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Appellants' points.

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agreed that the appurtenances should include all that they appeared to include, and that the defendant would not make a change in such appearances in derogation of his grant ; and that in strict reliance upon the promise of the defendant, not to change the appurtenances as they then existed and were understood, the plaintiffs executed the lease.

Parol evidence to this effect was partly given and partly offered to be given, but rejected. The plaintiffs did show that before the lease was executed the defendant proposed that, by express terms in the lease, he should reserve the right of cutting a door from the hall into the saloon, to which plaintiffs strenuously objected, and defendant expressly waived the point in plaintiffs' favor. It must be assumed in this case that if the plaintiffs had been permitted to give in all the evidence competent under the issues, within the rules stated, they would have made out a *prima facie* case entitling them, in the absence of evidence to the contrary, to relief against the injurious use of the hall leading to their premises, or of the side door that was cut from said hall into the saloon.

For the reasons stated the dismissal of the complaint constituted error.

Before FREEDMAN, P. J., and GILDERSLEEVE, J.

*Decided July 5, 1892.*

Appeal from a judgment entered in favor of defendant upon a dismissal of the complaint after trial at the equity term.

*Bullard & Shannon*, attorneys and *E. F. Bullard* of counsel, for appellants, argued :—

I. The court erred in ruling that the lease did not give the exclusive use of the hallway to the plaintiffs or prevent the cutting of a door from the hall into the saloon as described in the complaint. "A grant of a thing will include whatever the grantor had power to convey, which is reasonably necessary to the enjoyment of the thing granted." 3 *Wash. on Real Prop.*, 419. "Some things pass by the conveyance of land as incident, appendant or appurtenant, such as a right of way or easement. If a house or store is granted, everything passes which belongs to, and is in use for it as an incident or appurtenant." 4 *Kent*, 467; *U. S. v. Appleton*, 1 *Sumner Rep.*, 492. "The term appurtenance signifies some-

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thing appertaining to another thing as principal, and which passes as incident to the principal thing." *N. Ips. Factory v. Batchilder*, 3 *N. H. Rep.*, 190; *Havin v. Elliott*, 10 *Peters U. S.*, 25. If the defendant could not enter the saloon without cutting the door from the hall, the law would presume that he intended to reserve a right of way as a matter of necessity. "But it must be strictly a way of necessity, and great convenience will not be sufficient." *Washburn's Easements, etc.*, 32. "It cannot be denied that if a man builds a house and there is actually a way used, or obviously and manifestly intended to be used by the occupiers of the house, the mere lease of the house would carry with it the right to use the way, as forming a part of its construction." *Ib.* 27. Deeds are construed most strongly against the grantor. The lease carried the hall as much as the upper loft, because no reservation was made by the lessor. In the case of *Schrymser v. Phelps*, 33 *Hun*, 474, the mortgage released a certain portion of the premises, without reserving a right of way which was used in the adjoining building, held the right of way was lost. So, in the case at bar, the defendant and his counsel wanted to make the reservation, but the tenant refused to hire with such reservation and the landlord waived it. "The purchasers take with all the incidents and appurtenances which appear at the time of sale to belong to it." *Simmons v. Cloonan*, 81 *N. Y.*, 557.

II. The plaintiffs had also a right to recover for the nuisance permitted by the defendant. The plaintiffs offered to prove these which were their main cause of damage. Such acts were clearly admissible. 128 *N. Y.*, 341. In such a case the landlord is liable and it amounted to an eviction if the plaintiffs had abandoned the premises. *Gerard on Titles to Real Estate*, 185. If the landlord permits it he is equally liable. *Hochstrasser v. Martin*, 41 *State Rep.*, 761. Thus when the owner rents premises knowing that they will be used as

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a bawdy house he can be convicted as a keeper. *People v. Erwin Clark*, 4 *Den.*, 129. In this case the plaintiffs desired to keep a respectable house for persons of small means, and the lease restricted them from admitting females. Yet the defendant permitted a nuisance by allowing lewd women to enter the only hall by which the plaintiffs' guests could enter, which ruined the business of the plaintiffs.

III. The verbal contract proved that the door should not be opened, was an independent contract, and not excluded by the writing. *Lewis v. Seabury*, 74 *N. Y.*, 409. The plaintiffs refused to take the lease except on those conditions and the defendant assented. Such assent is equally binding as a direct promise.

*J. Homer Hildreth*, attorney and of counsel, for respondent, argued:—

I. The complaint being founded upon a written lease, executed by both parties to this action, the plaintiffs must stand or fall thereon. Reference to the lease in evidence shows that the specific premises demised are the "six upper lofts." Nothing is said therein about the means of approach or entrance to said premises; and no provision is made therefor, except the language usual to all leases,—“with the appurtenances.” These latter words it is well settled pass nothing but a privilege or easement, incident to the leasehold to-wit: free ingress and egress. See *Co. Lit.*, 121; 1 *Chit. Pr.*, 153, 154; 10 *Peters R.*, 25. Hence nothing contained in said lease grants to plaintiffs the exclusive use and control of the entrance or hallway from Third avenue to said demised premises which is averred to be “appurtenant thereto.”

II. Recognizing such to be the fact, plaintiffs' counsel thereupon sought, under the averments of the complaint, to introduce evidence of a prior or contemporaneous agreement, touching the use of said hallway and

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leasing of a lower floor to third parties. Such line of evidence was in the first instance admitted under defendant's objection, by the court below, "for what it is worth;" but thereafter the plaintiffs having rested the court upon further deliberation granted the motion of defendant's counsel for a dismissal of the complaint.

III. The final disposition of the case by the justice sitting at special term, was the only one warranted by the pleadings and proofs, and in harmony with the settled law of this state because (a) The case at bar is within the rule not the exception; no oral collateral agreement to the lease is alleged in the complaint but at the most only a prior or cotemporaneous one, "which led to the execution of said lease." Neither is any fraud, mistake or ambiguity averred. The rule is the same in equity as at common law; and where a lease is in writing, the rights and duties of the parties depend upon the terms or legal intendment of the lease itself, as it is conclusively presumed that the whole engagement is embraced therein. Therefore the contract cannot be controlled by evidence that it was executed on the faith of cotemporaneous or preceding oral stipulation not embraced in it. Especially is this rule absolutely controlling in equity where it appears that the party knew of the nature and contents of the instrument signed. *Wilson v. Deen*, 74 *N. Y.*, 531, 534, 536, 538. The principle so clearly asserted in *Wilson v. Deen*, *supra*, has since been faithfully followed and repeatedly affirmed, in spite of hardships admitted by the courts to exist in special cases. *Eighmie v. Taylor*, 98 *N. Y.*, 288, 294, 297, 300; *Englehorn v. Reitlinger*, 23 *J. & S.*, 485, *Affirmed in the Court of Appeals*. See 122 *N. Y.*, 76, wherein the language of RAPALLO, J., in *Wilson v. Deen*, *supra*, viz.: "Writings would be of little value if they could always be controlled by oral evidence of what was said by the parties at the time of their execution!"—was expressly adopted as expressing the unchanged views

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of the court. See also, *Thomas v. Scott*, 127 *N. Y.*, 133, 139, 142, re-affirming the rule laid down in the previously cited cases. Likewise see *Bohm v. Lies*, *N. Y. City Superior Court*, April General Term, 1892, wherein the general rule is stated to be well settled that parol evidence must be excluded when offered to contradict or vary the terms or legal import of a written agreement; and that an agreement being complete on its face, oral evidence offered to vary it was properly excluded by the court.

BY THE COURT.—FREEDMAN, P. J.—The plaintiffs, by their complaint, alleged : That by a lease, duly executed under the hands and seals of the parties, the defendant demised to them the six upper lofts (consisting of three in front and three in the rear) of the buildings known as No. 2374 Third avenue in the city of New York, to be used and occupied by the plaintiffs as a first-class lodging house or hotel for lodgers of the male sex only, together with the appurtenances, for the term of three years from May 1, 1891, at a certain yearly rent; that in and by the said lease the defendant covenanted that the plaintiffs, on paying the said yearly rent and performing their other covenants contained in said lease, should and might peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid; that when said lease was executed the lower room of the building was unoccupied; that the only entrance to said demised premises then and now, from Third avenue, is by a hall about six feet wide, with a front door and stairs in the hall leading to the second story, which front door and hall are appurtenant to the demised premises, without which the said demised premises could not be used; that during the negotiations which led to the execution of said lease the defendant stated in substance to the plaintiffs, that he might want to rent said lower floor for a saloon, and would like to cut a door from said hall

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into the lower room; that the plaintiffs then and there stated to the defendant that they would not hire the premises or execute said lease if such door was to be cut through or if the lower room was to be rented for a saloon; that the defendant then promised he would not do so, if the plaintiffs executed the lease, and thereupon the said lease was executed by both parties; that the demised premises have forty-four lodging rooms, and they are rented by the plaintiffs to respectable people only, for lodging purposes, and no beer or intoxicating drinks are sold on said premises, of which fact the defendant had due notice; that about July last the said defendant rented said lower room to one S. Buttner, who went into possession, and about October 1 commenced selling intoxicating drinks; that on the 15th day of October, 1891, said Buttner, or some one in his employ, without the consent of the plaintiffs, but with the permission of the defendant, cut an opening for a door from said hall into the lower floor or saloon, and placed a door therein; that the plaintiffs immediately notified said defendant of the said door, and objected to the same and stated to him in substance that he would be held responsible if he did not have said door closed and keep the persons frequenting said saloon from entering the said hall; that ever since October 17th last the said saloon has been a disorderly house; that Buttner was succeeded by another tenant and that since that time the said room was kept partly as a resort for lewd women and partly as a pool-room; that lewd women and disorderly men have been in the constant habit of entering the said hall and passing through the said door into the said lower room and at times have been in the habit of making disorderly and loud noises and frequently as late as four o'clock in the morning; that the plaintiffs protested against these occurrences but without success; that it is necessary for the business of the plaintiffs that the front door leading from the street into said hall

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should be unlocked during the day and most of the night to allow their guests to come and go as their business might require; that by reason of the occurrences complained of and the passage of the persons complained of through said hall, many of the plaintiffs' guests have been compelled to abandon the demised premises.

Upon these and other allegations not necessary to be specifically mentioned, including allegations of damages sustained and that the plaintiffs have no adequate remedy at law, the plaintiffs prayed that the defendant, his agents and tenants, be restrained from entering the hall leading from the front door to the upper stories occupied by the plaintiffs; that the said defendant be compelled to close up the door leading from said hall into the saloon or lower room of the building; that the plaintiffs recover their damages already sustained, etc., etc.

The defendant, by his answer, admitted the execution and delivery of the lease as alleged by the plaintiffs, but in all other respects denied the allegations of the complaint.

Upon the trial of these issues the learned judge, after hearing part of the testimony offered by the plaintiffs, refused to hear the remainder and dismissed the complaint upon the ground that the lease did not give the exclusive use of the hallway to the plaintiffs and did not prohibit the cutting of a door from the hall into the saloon. This ruling seems to have proceeded upon the theory that the lease constituted the whole contract between the parties and that, inasmuch as the lease did not in terms grant to the plaintiffs the exclusive use and control of the hallway, evidence of a prior or contemporaneous oral agreement concerning said hallway was inadmissible and so far as it had been permitted to be given, had to be disregarded.

In this I think the learned trial judge erred.

The general rule which excludes conversations, negotiations, and parol agreements prior to the execution of

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a written agreement relating to and springing out of such conversations, negotiations, etc., does not apply. (1) When the original contract, although verbal, yet was entire, and only a part of it was reduced to writing, in which case the part not so reduced can be proved by parol; and (2) When the consideration, or a consideration further than that expressed in the writing, does not appear in the writing, in which case the consideration, or the farther consideration, may be proved by parol. *Hope v. Smith*, 35 *N. Y. Superior Ct. R.*, 458, *affm'd* 58 *N. Y.*, 380.

So parol evidence is always admissible as to the meaning which the parties themselves attached to a particular word or phrase in the contract. Such evidence does not contradict or vary the terms of the written contract, but is explanatory thereof.

In the case at bar the lease was for the six lofts “*together with the appurtenances.*” These words gave to the plaintiffs whatever was attached to or used with the premises, as incident thereto, and convenient or essential to the beneficial use and enjoyment thereof, and the plaintiffs took any easement or servitude used or enjoyed with the demised premises. *Doyle v. Lord*, 64 *N. Y.*, 432.

As the appurtenances were not specified, parol evidence was admissible to show their character and extent, and that being so, parol evidence was admissible to show that the parties, preparatory to the execution of the lease, met and discussed such character and extent, and agreed that the appurtenances should include all that they appeared to include and that the defendant would not make a change in such appearances in derogation of his grant, and that in strict reliance upon the promise of the defendant not to change the appurtenances as they then existed and were understood, the plaintiffs executed the lease.

Parol evidence to this effect was partly given and

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partly offered to be given, but rejected. Moreover the plaintiffs did show that before the lease was executed, the parties did meet and had a discussion; that in the course of it the defendant proposed that he should be allowed in express terms to be inserted in the lease to reserve the right of cutting a door from the hall into the saloon, and that the plaintiffs so strenuously objected to it, giving reasons for their objections, that the defendant expressly waived the point in plaintiffs' favor.

Under all the circumstances as they appear at present, it must be assumed that the plaintiffs, if they had been permitted to give all the evidence which was competent under the issues within the rules above stated, would have made out a *prima facie* case entitling them, in the absence of evidence to the contrary, to some relief against the injurious use of the hall leading to their premises or of the side door cut from said hall into the adjoining saloon.

For the reasons stated the dismissal of the complaint constituted error.

The judgment should be reversed and a new trial ordered, with costs to the appellants to abide the event.

GILDERSLEEVE, J., concurred.

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Appellant's points.

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THOMAS F. MILLER, APPELLANT v. HENRY  
HOLMES, RESPONDENT.

*Slander—Variance between the proofs and the allegations of the complaint, when disregarded.*

The allegation of the complaint was to the effect that defendant had said of the plaintiff that he had robbed him of four hundred dollars. At the close of the plaintiff's case the evidence did not warrant more than an inference that defendant had said that the plaintiff had robbed him of twelve hundred dollars. Leave to amend the complaint so as to conform the same to the proof was denied, and the complaint was dismissed because of variance. *Held*, to be error, as a variance between an allegation in a pleading, and the proofs is not material unless it has actually misled the adverse party to his prejudice.

Before FREEDMAN, P. J., and DUGRO, J.

*Decided July 5, 1892.*

Appeal from a judgment entered upon a dismissal of the complaint at the trial.

*Maurice Meyer*, attorney, and *A. C. Palmer* of counsel, for appellant, argued:—

I. It is not necessary, in order to render words imputing a crime actionable, that there should be the same certainty in stating the crime imputed as would be requisite in an indictment for it. *Miller v. Miller*, 8 *Johns.*, .74; *Gibbs v. Dewey*, 5 *Cow.*, 503. If the words, in their natural and ordinary sense, import a criminal charge, they are actionable.

II. Variance in the slanderous words proved from those charged, disregarded when they could mislead. *Boynton v. Boynton*, 43 *How.*, *Ct. of Appeals*. There is no pretense here that the defendant was misled by the

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allegation in the complaint, as to the amount he charged plaintiff with robbing him of. He certainly was prepared to defend the action as to \$1,200, or any other amount, having denied all of the allegations of slander in his answer.

III. The court will not allow a formal objection of a variance to defeat an action, when it is evident no injury would be sustained by the objector other than depriving him of the mere formal advantage; the court will remedy the defect, even after trial. *Every v. Merwin*, 6 *Cow.*, 360. The materiality of the variance may be apparent on the pleadings, and in such cases it must be the duty of the court either to exclude the evidence creating the variance or so to amend the pleading as to admit its introduction. *Lyon v. Blossom*, 4 *Duer*, 318. When it appears the party was not and could not have been misled, variance between complaint and proof may be disregarded without amendment. *Chapman v. Carolin*, 3 *Bosw.*, 456. Section, 541 of the Code of Civil Procedure is: "Where however the allegation to which the proof is directed is unproven, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance, but a failure of proof." It is sufficient to prove the substance of the words alleged, if spoken in same person, as alleged. *Miller v. Miller*, 8 *Johns.*, 74. It is sufficient to make out a cause of action for slander, that some part of the slanderous words charged were spoken, and that they were substantially the same, in force and meaning, as those alleged. *Schoonoven v. Beach*, 23 *Weekly Dig.*, 348.

IV. The court must, upon application, allow a pleading to be amended at any time during the pendency of the action, even on appeal, if substantial justice will be promoted thereby. *Enright v. Seymour*, 8 *State Rep. C. P.* Subject to the limitation, that the party was misled or taken by surprise, there is no restriction upon the power of amendment of pleadings on trial, where the

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amendment is in favor of justice. *Van Ness v. Bush*, 14 *Abb.*, 33. A complaint in false imprisonment may be amended at trial, by adding allegations of special damage, if they are proved. *Clemons v. Dairs*, 4 *Hun*, 260. In slander, the complaint may be amended at trial, by adding the names of parties. *Wood v. Gilchrist*, 1 *C. R.*, 117. There can be no new cause of action here; the words charged were spoken at the time alleged in the complaint, and there is no dispute about the words, "You, Tom Miller, you stole" (whether \$400 or \$1,200), is all that is necessary to allege or prove; there is no material variance; the complaint should have been amended on motion of plaintiff's counsel, to conform to the proof. *Enright v. Seymour*, *supra*.

*Wager & Acker*, attorneys for respondent, argued:—

I. In an action for tort the cause of action alleged must be proved. The cause of action alleged was not proven, but a different cause of action, hence a failure of proof under Section 541 of Code. *Place v. Minster*, 65 *N. Y.*, 89; *Arnold v. Angell*, 62 *Ib.*, 508.

II. In action for tort complaint cannot be amended at trial by adding a new cause of action. Plaintiff having failed to prove either of the causes of action alleged, his complaint was properly dismissed.

BY THE COURT.—DUGRO, J.—This is an appeal from a judgment dismissing a complaint in an action for slander.

In the complaint there is, among other things, an allegation that the defendant had said of the plaintiff that he had robbed him of four hundred dollars.

At the close of the plaintiff's case the evidence did not warrant more than an inference that the defendant had said that the plaintiff had robbed him of twelve hundred dollars.

Leave to amend his complaint so as to conform to the

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Statement of the Case.

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proof was denied plaintiff and his complaint dismissed because of variance.

This was error, for a variance between an allegation in a pleading and the proof is not material, unless it has actually misled the adverse party to his prejudice, etc. § 539 *Code Civil Proc.*

I think the law upon the subject briefly stated is, "where the allegation and proof vary as to the words, it is enough if plaintiff proves that a distinct slanderous charge alleged, which is separable from any other unproven words alleged, was uttered in substantially the words alleged, it not appearing to have been materially qualified by other words not alleged." *Abbott's Trial Evidence*, page 661.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

FREEDMAN, P. J., concurred.

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FREDERICK SEGGERMANN, ET AL., PLAINTIFFS v.  
NAPOLEON VALENTINE, ET AL., DEFENDANTS.

*Contract for purchase of property by plaintiffs and sale to defendants at a price named, together with freight charges, actual expenses advanced and one per cent. additional—Question as to expenses.*

Subsequent to the delivery of the goods, it appeared that they had been undervalued at the Custom House, in the original entry, and plaintiffs were compelled to pay \$474.38 additional duties, which they sought to recover from defendants as *actual expenses incurred, etc.* Defendants claimed that said \$474.38 was paid as a fine or penalty for an under-valuation of the property for which defendants should not be held liable, etc. *Held*, It matters not whether the payment be considered as for a fine for under-valuation or for an additional duty; if it was for an expense

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Opinion of the Court, by DUGRO, J.

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advanced, within the meaning of the term "expenses" as used in the contract, the defendants must pay it. A fair interpretation of the word leads to the conclusion that it included the duties or fines. The parties so interpreted the contract in the payment of the first duties imposed, and as the fine does not appear to have been imposed through any fault of plaintiffs, the exceptions should be overruled.

Before DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

The trial judge directed a verdict for the plaintiffs in this case for amount claimed in the complaint, ordering the exceptions to be heard in the first instance at the general term.

*Charles Currie*, attorney, and *W. Wickham Smith* of counsel, for plaintiffs.

*John H. Parsons*, attorney and of counsel, for defendants.

BY THE COURT.—DUGRO, J.—The exceptions were ordered to be heard in the first instance at general term.

In July, 1890, plaintiffs and defendants contracted as follows: The plaintiffs agreed to take 5,000 crates of onions to be imported at a stated cost and freight, paying defendants cash on arrival, and taking all risk of importation; the defendants to insure goods under their policy and to pay plaintiffs for the actual expenses advanced. There were other terms in the contract unnecessary to state.

Plaintiffs imported 5,000 crates of onions, one half for defendants, and received payment from defendants of all that was claimed, including one half the amount of duty paid upon the whole original import entry.

Subsequently upon a reappraisement of the goods it appeared that they had been undervalued in the original entry at the Custom House and that the duty paid was

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Opinion of the Court, by DUGRO, J.

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\$36.50 less than that which should have been paid. By reason of this fact an additional duty of \$912.06 was payable under the laws of the United States on the whole importation.

These two amounts the plaintiffs paid and they now ask that the defendants contribute one-half.

The complaint sets forth that import duties to the amount of \$510.48 accrued, which plaintiffs paid on defendants' behalf and for their account, and on account of which there is still unpaid \$474.38.

The answer denies that these duties were paid, but admits the payment of \$66.10 as duties and sets forth that the \$474.38 referred to in the complaint was paid, if at all, as a fine or penalty for an undervaluation in the entry of the onions for which the defendants should in no manner be held liable.

It will be observed that the defendants contend in their answer that the mere fact that the \$474.38 was paid as a fine or penalty for an undervaluation is sufficient defence to the plaintiffs' claim.

Now, it matters not whether the payment be considered as for a fine for undervaluation or for an additional duty; if it was for an expense within the meaning of the term "expenses" as used in the contract, the defendants should pay it.

A fair interpretation of the word leads to the conclusion that it included the duties or fines. The parties themselves interpreted it to include the import duty.

The plaintiffs were necessarily compelled to pay the amount in question, and as the fine does not appear to have been imposed through any fault of plaintiffs (in fact it is not pleaded to have been imposed through the plaintiffs' fault) the exceptions should be overruled and the plaintiffs should have judgment upon the verdict, with costs.

GILDERSLEEVE, J., concurred.

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Statement of the Case.

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GEORGE T. NEWHALL, RESPONDENT v. WILLIAM  
H. APPLETON, ET AL., APPELLANTS.

*Contracts—Canvasser's commissions on orders obtained for publications  
—Acceptance shown by reception and entry on the firm books.*

In an action to recover commissions claimed to be earned by plaintiff as a canvasser of the defendants' publications, the principal contention was the construction to be placed upon the words of the contract, which was oral. The plaintiff testified to the effect that in a conversation with the head of defendants' serial department it was agreed that he was to receive \$4 "an order for each order that he took" for the publications other than the cyclopedia, and \$15 "an order" for the cyclopedia. Blank subscription papers were supplied by the defendants to the plaintiff, who procured the signatures to the papers of a number of persons in Texas and Louisiana and forwarded the same by mail to the defendants. The plaintiff produced evidence tending to show that the subscription papers so signed were "orders" within the meaning of the contract, upon acceptance of which he was entitled to the agreed commissions. The defendants contended that the expression "four dollars an order" had a well settled meaning in the business and was so understood by the parties to the contract, viz.: that the commission was to be regarded as earned only after the subscriber had taken and paid for two parts or numbers of the work subscribed for. The referee refused to find to this effect but did find that upon acceptance by the defendants of the orders, the commissions became due, and that defendants did so accept the orders. *Held*, that no error was committed by the referee in so ruling. If the referee erred in finding that the agreement in question was that the plaintiff should be paid when his orders were delivered to defendants and accepted by them, he only erred in finding that an acceptance by defendants was a part of the agreement, and such an error could not prejudice defendants. There was evidence that an order became a good order upon acceptance by defendants, and such acceptance was shown, as in the present case, by the reception of the orders and entry thereof in the firm books.

Before SEDGWICK, Ch. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

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Opinion of the Court, by DUGRO, J.

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Appeal by defendants from a judgment entered upon the report of a referee in favor of the plaintiff. The facts are sufficiently stated in the head-note. For record of former appeals see 15 *J. & S.*, 38; 17 *Ib.*, 238; 22 *Ib.*, 557; 25 *Ib.*, 343; 26 *Ib.*, 585.

*Campbell & Paige*, attorneys, and *E. W. Paige* of counsel, for appellants.

*W. W. Badger*, for respondent.

BY THE COURT.—DUGRO, J.—If the referee erred in finding that the agreement in question was that the plaintiff should be paid when his orders were delivered to the defendants, and accepted by them, he only erred in finding that an acceptance of the orders by the defendants was part of the agreement, and such an error could not prejudice the defendants.

There is evidence which will sustain a finding that the orders were accepted.

The witness Rowland states that the only difference between an order and a good order is that the latter must be accepted by the house, and that an order becomes a good order as soon as the house receives it and enters it on the books.

It follows that an order which has been received and entered on the books is one that has been accepted. There is evidence that the orders were received and entered on the books.

Upon the whole case the judgment should be affirmed.

GILDERSLEEVE, J., concurred, SEDGWICK, Ch. J., not voting.

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Statement of the Case.

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MARY McKAY GREENWOOD, ET AL., AS EXECUTORS, ETC., RESPONDENTS v. THE MANHATTAN RAILWAY COMPANY, ET AL., APPELLANTS.

*Damages by elevated railroad—Evidence as to rents of neighboring properties by entries in books of deceased owner—Written leases executed and recorded as evidence of rents, when competent.*

For the purpose of showing the rents of certain properties in the vicinity of plaintiffs' premises, in an action to secure damages to rental value by an elevated railroad, and thereby to establish a course of rental value, it is competent to put in evidence entries of rents received, made in the handwriting of deceased owner of the premises, in books kept for that purpose, even though unauthenticated by any direct proof as to the time when they were made or as to the knowledge possessed by the person making them. The entries having been made prior to the coming of the elevated railroad, it is not to be supposed that decedent would have had any motive for falsifying his entries in contemplation of bringing a suit for loss of rental value against the elevated railroad company. The entries were made in the ordinary course of business by a third person now dead; they related to matters presumably within his peculiar knowledge and were to a certain extent admissions against his interest. There was apparently no particular motive to pervert the facts.

The plaintiffs also sought to establish certain rentals by putting in evidence certain written leases duly executed and recorded but unauthenticated by any proof of possession under them or payment of the stipulated rent. *Held*, that the objections to the leases were properly overruled. While not conclusive, the agreed rent is a strong evidence of the real value of the use and occupation, and is worthy of admission as evidence. Where a lease is properly executed and recorded the presumption is that it is *bona fide*; and the burden of proof was upon defendants to show that there were separate arrangements allowing the lessees to pay less than the rents called for by the leases, or that the leases were never acted upon. *Schule v. Cunningham*, 54 N. Y. Super Ct., 802, distinguished.

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

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Opinion of the Court, by GILDERSLEEVE, J.

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Appeal by defendants from a judgment, entered on the verdict of a jury, in favor of the plaintiffs, and from an order denying defendants' motion for a new trial.

*Davies & Rapallo*, for appellants.

*Robert S. Rudd*, for respondents.

BY THE COURT.—GILDERSLEEVE, J.—The judgment awards to the plaintiffs \$7,000, damages, together with \$549.04, costs, for the rental loss sustained by the plaintiffs in their premises Nos. 31 and 33 Vesey street, in this city, by reason of the erection and operation of defendants' elevated railroad.

The defendants' counsel relies, in his argument for a reversal of the judgment, upon two alleged errors of the trial judge in the admission of evidence, namely, the admission of entries made by deceased persons in the books of the Meeks' Estate, unauthenticated by any direct proof as to the time when they were made or as to the knowledge possessed by the persons making them; and also the admission of the leases of various properties, unauthenticated by any proof of possession under them or of the payment of the stipulated rent.

The objections to the admission of the leases, we think, were properly overruled. The agreed rent is a strong evidence of the real value of the use and occupation, *Moore v. Deyoe*, 22 *Hun*, 222. It is not, of course, conclusive evidence, but it is some evidence, and is worthy of admission. The defendants' counsel insists that the plaintiffs should have proved that the leases were acted upon, and were not waste paper; that the lessees took possession of the premises, and paid the rent stipulated for in the leases, and that there were no separate arrangements by which the lessees were allowed to pay less than the rents specified in the leases. But where a lease is properly executed and recorded, the pre-

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Opinion of the Court, by GILDERSLEEVE, J.

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sumption is that it is *bona fide*; and the burden of proof was upon the defendants to show that there were separate arrangements allowing the lessees to pay less than the rents called for by the leases, or that the leases were never acted upon.

Nor do we think the defendants' objection to the admission of the entries, made in the books of the Meeks' Estate, well taken. Edward B. Meeks testified that he was the executor of Joseph W. Meeks, deceased, who, in his lifetime, was the owner of Nos. 14, 16, 28 and 30, Vesey street; that in 1876, two years before the death of his father, the said Joseph W. Meeks, he took charge of the books relative to the rents of these buildings for his father; that when he so took charge of said books, he found certain entries relative to such rents in the books kept by his father for some years prior to 1876, which entries were made in the handwriting of his father or of his brother, also deceased, who had kept the books for his father previous to 1876; and that these entries had been made prior to 1876, the time when witness took charge of said books. As the elevated railroad was not built in 1876, it is not to be supposed that the witness's deceased father would have had any motive for falsifying his entries, in contemplation of bringing a suit for loss of rental value against the railroad company. These entries were to a certain extent made against the interest of the party making them, since they were an admission of payment of rent to him by his tenants; they were entries made in the ordinary course of business; the matter was, presumably, within the peculiar knowledge of the party making them, and there was, apparently, no particular motive to pervert the facts. The party is dead, and his entries in his books are offered in evidence. They are entries made by a third person in his own books in the ordinary course of business. We are of opinion that it was not error in the court below to receive them in evidence. 1 *Greenleaf on Evidence*,

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Opinion of the Court, by GILDERSLEEVE, J.

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§§ 116 and 120; *Brewster v. Doane*, 2 *Hill*, 537; see also, *Jermain v. Denniston*, 6 *N. Y.*, 276.

A careful examination of the case of *Schule v. Cunningham*, 54 *N. Y. Super. Ct.*, 302, relied upon by defendants' counsel as authority for his contention, discloses a difference that renders it inapplicable to the case at bar. In that case, it did not appear that the entry of the deceased physician, sought to be put in evidence, was of a character usually made in the course of professional duty or in the ordinary course of business of a physician; nor was there anything in the entry or any extraneous proof to show when it was made. In its opinion, the court, SEDGWICK, Ch. J., said: "The entry did not disclose when it was made. Indeed, part of it indicated that that part was made after the fact referred to was declared to have occurred. Take it altogether it seems to be a condensed history of observations made in times that had passed." The court did not hold that the entries were incompetent evidence, but that their admission was error because plaintiff failed to prove all the conditions which the law affixes to entitle them to admission.

There are no other questions presented on this appeal that are of sufficient importance to require discussion.

The judgment and order appealed from are affirmed, with costs.

FREEDMAN, P. J., and DUGRO, J., concurred.

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Statement of the Case.

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THE CENTRAL NATIONAL BANK OF THE  
CITY OF NEW YORK, APPELLANT v. LEONARD  
D. WHITE, ET. AL., RESPONDENTS.

*Liability of defendants to repay the bank, plaintiff, moneys received by them from one Sanford, a former cashier of the bank, in the shape of cashier's checks, on account of Sanford's personal stock speculations.*

Between June, 1866, and July, 1869, plaintiff made purchases and sales of stocks, securities and gold, through the defendants, as brokers, and these dealings were managed and directed by Sanford, who gave all orders to defendants that were brought to their office by plaintiff's clerks or messengers, and defendants were constantly receiving cashier checks, drawn by W. H. Sanford, cashier, upon the plaintiff, which were paid by plaintiff in the usual course of business through the clearing house. The defendants received in such dealings upwards of one hundred such checks, aggregating half a million of dollars, and no question or objection to the payment of these checks was ever made until July 1, 1869, when Sanford absconded after appropriating to his own use stocks, securities and moneys, of plaintiff and its customers. This action seeks to recover from defendants the amount of fourteen of the checks, selected out of the one hundred checks by plaintiff's counsel, on the ground that the money represented by these checks, and so paid to defendants, were for use in Sanford's private stock speculations, and that defendants knew actually or constructively what Sanford was doing. After Sanford's defalcation the plaintiff called upon defendants and was permitted to see Sanford's accounts, as kept by defendants, and then informed the latter that Sanford had been speculating on his own account. After receiving this information, defendants discovering certain balances in favor of Sanford with other brokers, they brought an action against him and recovered about \$2,000, by default, upon the theory that the transactions in question were with Sanford individually, and that he was their customer and not the plaintiff. Plaintiff's counsel claimed that this action by defendants against Sanford, and the judgment entered and enforced against Sanford's individual property, constituted an election by defendants to consider Sanford as their customer in these transactions, and precludes the defendants from insisting that the plaintiff and not Sanford was their customer in these transactions in question, and that such act precludes them from contesting that question in this action.

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Opinion of REFEREE.

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*Held*, that this legal proposition of the plaintiff's counsel cannot be sustained either by principle or by authority. The doctrine invoked is "the election of remedies." This doctrine cannot be invoked and made available beyond the point of precluding the defendants, after suing Sanford on the account, from proceeding against the plaintiff to recover any balance not realized in judgment against Sanford. Such action on the part of the defendants cannot create a remedy in favor of the plaintiff that did not exist before the action. The relations between the bank and defendants existed and were fixed before Sanford absconded, and if the dealings before that time were with the bank, nothing that plaintiff's president said to defendants, and no action taken by the defendants in consequence thereof, could change the previous existing relations. The cases cited by counsel do not sustain the proposition he seeks to establish in this case. They do not go further than to hold that where the plaintiff has two inconsistent remedies and adopts one of them he cannot afterwards resort to the other. The referee's conclusion upon the whole case, and the judgment entered in pursuance thereof, are correct.

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

Appeal from a judgment entered upon the report of a referee dismissing the complaint.

The facts and points in the case appear fully from the opinion of the court and the following opinion of the referee before whom the case was tried.

HENRY H. ANDERSON, REFEREE.—"The plaintiff, a bank organized in the city of New York, had a large number of customers who bought and sold gold, stocks, bonds and other securities, through the agency of the bank, the securities being kept by the bank to be used subject to the order of the customer. The entire charge of this business, the custody of the securities, purchase and sale of the stocks, and the correspondence with the customers in relation to the same, were entrusted to the cashier of the bank. Neither the directors nor any superior officer exercised any supervision over him; he was left with unlimited authority to buy and sell, and with power to do whatever he pleased with the securities. He made his purchases and sales through the agency of

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Opinion of REFEREE.

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the defendants, who were brokers in Wall street. The purchases were made by him through the agency of the runners of the bank, those messengers who were in the habit of collecting and paying out whatever moneys were not collected or paid out over the bank counter, and the orders were transmitted through these runners, or stocks purchased or sold, as the case might be, and, when purchased, the same were paid for by the cashier's check, that is to say, the check of the cashier drawn upon the bank itself.

"The entries upon the books of the defendants were originally in the name of W. H. Sanford, cashier. After a while the word cashier was dropped in the ledger, although numerous purchases were entered in the blotter, the book of original entry, in the name of Sanford, as cashier, and carried forward to the ledger without the addition of cashier. This circumstance, rather peculiar in itself, is not explained, the absence of explanation being accounted for by the death of the bookkeeper. Each one of the partners who is living denies that he had any knowledge of the books being kept in that way, and also swears that he knew of no transaction had with Sanford which was not believed by him at the time to have been on account of the bank.

"In the summer of 1869, Sanford, the cashier, absconded, and it was found that he had absorbed or made way with, in some manner, the greater part of the securities which the bank was supposed to have on account of the various customers dealing with it in that behalf.

"The president called upon the defendants, who showed him their books and accounts which they called the accounts of the bank with them, and he thereupon said that the cashier had no authority to act in respect of such matters as he had done.

"The defendants, relying upon this statement, or upon the spur of this statement, immediately attached certain property of Sanford's, found in New York, for the bal-

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ance of accounts then standing upon their books, and recovered a portion of their claim by default out of the attached property. This suit was brought to recover the amount of certain of the cashier's checks delivered to the defendants in payment for securities purchased, as money had and received to the use of the bank, and the plaintiff insists that the defendants are estopped to deny that this was the private account of Sanford, the cashier, by reason of their election to pursue Sanford in the attachment suit, and the plaintiff's counsel has urged, with great ability and earnestness, numerous decisions bearing upon the subject of election, claiming that they establish the legal proposition maintained by him.

"I have made a very careful examination of these decisions, but cannot bring myself to agree with the plaintiff's counsel that the proposition urged by him can be sustained, either upon principle or by precedent. The defendants, acting upon representations made by the plaintiff, balanced the account as it stood, and sued the cashier. It may very well be that having made this election to follow the cashier, the defendants could not maintain a suit against the bank for the same balance, but an election between two existing rights of action or remedies can hardly be construed as also establishing in favor of the other party a right of action which did not exist at the time the election was made, and which could only exist by reason of such election. At the time that the defendants brought this suit against Sanford the bank had no cause of action against them. Bringing such suit certainly did not create a cause of action. The case is an extraordinary one, and it seems strange that such large transactions could have been conducted so loosely, both on the part of the bank and on the part of the brokers; but I think it is one of those cases where the plaintiff, by its own neglect, has justified the defendants in treating all the transactions with Sanford as conducted in behalf of the bank, and has relieved

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Appellant's points.

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them from any responsibility by reason of the misconduct of the plaintiff's officer. The cashier's checks were all honored. The defendants had no notice of the misappropriation of the securities belonging to the customers, and which were, perhaps, sold through their agency. The long course of recognition of the cashier's checks on the part of the bank justified the defendants in believing that the drawing of such checks was known to, and authorized by, the plaintiff. I have, therefore, dismissed the complaint."

*Martin & Smith*, attorneys, and *George A. Strong* of counsel, for appellant, argued:—

I. There is absolutely nothing in the alleged defences in this action. The defences attempted were three in number—estoppel, negligence, and payment. The latter may be summarily dismissed. Defendants sought to make out that Sanford had repaid to the bank all moneys which he abstracted by means of cashier's checks. The referee found against that contention. In spite of his refusal, defendants insisted on inserting in the printed case the evidence upon this issue. Of course, they cannot retry it now. A respondent cannot urge on the appeal a point ruled against him on the trial. *Hickey v. Taafe*, 99 *N. Y.*, 204, 210; *Wangler v. Swift*, 90 *Ib.*, 44. A disposition as summary may be made of the defence of negligence. If defendants believed, and had reason to believe, that Sanford in all these transactions was acting for the bank, this, of itself, is a sufficient defence, and a further defence of negligence, if there be one, would be unnecessary. If, on the other hand, they knew that Sanford was really stealing bank moneys, then all the negligence in the world would not entitle them to collude with him in the operation and receive some of the moneys. It has never yet been held by any court that if A discovers that B's employer is careless in the matter of supervision, he may co-operate with B in

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Appellant's points.

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robbing him. Indeed there is no hint of any such proposition in the referee's findings. He limits himself to the fact of absence of supervision, but nowhere intimates that this constitutes a defence, and no such defence is pleaded. The defence, and the only defence which the referee sustains, is that of estoppel. In various forms he presents this proposition. As already suggested, it involves two entirely distinct propositions, both of which must be found for defendants or the defence fails. (a). Defendants believed that Sanford was acting for the bank. (b). This belief was justified by the bank itself. There was a complete failure to establish the other element of the estoppel, that the bank was responsible for this alleged belief that Sanford was speculating for it. Of course, this question is immaterial, if the evidence establishes that defendants, or their employes, knew that Sanford was speculating on his own account. For in that case there is no effect, whatever the conduct of the bank might have justified them in believing. But this additional finding is indispensable to a successful defence. If defendants could convince the court that, in truth, neither they nor their agents knew or suspected what Sanford was really doing, but, on the contrary, honestly believed that he was speculating for the bank, it would avail them nothing, unless they could also show that they were justified by the bank in so believing. It is not pretended that the bank made any representations to defendants to this effect. On the contrary, it is expressly found that none of its officers ever met any of the defendants until after Sanford absconded. Defendants had only Sanford's own acts and declarations as to his authority, which are, of course, wholly insufficient. *Devens v. Mech's, etc., Co.*, 83 *N. Y.*, 171; *Eaton v. Delaware, etc., R. R. Co.*, 57 *N. Y.*, 390. But they say, as a last resort, these cashier's checks were always paid by the bank. In other words, the success of Sanford's scheme to defraud and rob the bank constri-

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Appellant's points.

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tutes a reason why the moneys cannot be reclaimed. Let us see just what the situation was. The bank was accustomed to buy and sell securities for its correspondents. Such transactions were always for cash. It was the cashier's duty to pay for the purchases, and that was the extent of his authority. It is evident that in the execution of this duty he would have frequent occasion to draw these cashier's checks, and when they returned to the bank for payment they would, of course, be paid. They would then come into his possession, or that of clerks under him. This being so, he took advantage of his opportunity to draw and deliver to defendants the checks used in his speculations through them. They deposited these checks in their own bank, which sent them in through the Clearing House to plaintiff, and they were thus paid. This is all on which it has been held that plaintiff is estopped to complain of the robbery. It is, we submit, entirely insufficient. It is apparent that nothing about the check would show whether it was paid out in a legitimate or illegitimate transaction. The bank was constantly buying securities for its correspondents, and paying for them in these checks. Its cashier was the one who had charge of this business. When one of these checks came in, if any of his superiors had seen it, instead of merely clerks under him, the natural presumption would be that it had been paid out in a proper transaction. There was absolutely nothing to show the contrary. The payment, therefore, of the checks was no ratification of his act in issuing them in such transactions. Ratification involves full knowledge of all material facts. *King v. Mackellar*, 109 *N. Y.*, 223. Nor can the payment be claimed to have been a voluntary one, not to be recalled. That also requires full knowledge. *Duncan v. Berlin*, 60 *N. Y.*, 154; *Lake v. Artisans' Bk.*, 3 *Abb. Ct. App. Dec.*, 15. This defence also involves the claim, that the payment of these checks by the bank, which, in point of fact, did

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not know that Sanford had used them in his own speculations, estops it from complaint as against defendants, who did know this fact. In other words, when it is defendants, who had the fullest knowledge, and plaintiff, who in its ignorance was being deceived and robbed, the latter must be held to be estopped, as against the former. Such an application of this doctrine of equity has not often been suggested.

II. Under the circumstances of this case the only possible defence would be to show that Sanford had actual authority from the bank for the transactions carried on in his name. We have tried, at some length, to show that even upon defendants' theory the defence failed. We will now briefly indicate our contrary theory of the burden necessarily resting upon them. Sanford's operations were speculations "pure and simple," as defendant Morris expressly admitted. The bank itself having no power to engage in such speculations, there could be no implied authority to Sanford to engage in them on its behalf. There can be no presumption that a corporate agent has a power not possessed by the corporation itself. *Alexander v. Cauldwell*, 83 *N. Y.*, 485-6. Whoever seeks to hold one person for the acts of another must show the latter's authority. *FREEDMAN, J., Dabney v. Stevens*, 10 *Abb. N. S.*, 44; *affirmed*, 46 *N. Y.*, 631. That was an action stoutly litigated in this court, and which has since been often cited. No one will dispute the rule there laid down. Our present proposition, however, is that in the case at bar nothing will do but proof of actual authority. It rests upon the uncontradicted fact that every entry relating to the checks in controversy represented the transaction to be for Sanford personally. Although on their face, therefore, they were Sanford's transactions, defendants claim that the bank is to be responsible for them. In the nature of things there is but one way to make this out—to prove that in fact and in truth Sanford was acting for the bank. No

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Respondents' points.

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claim of ostensible or apparent authority can be sustained. Every case of apparent authority involves: (1.) A false but deceptive appearance given to the act by the alleged agent. (2.) A reliance by the other party upon this outward appearance. Now in the case at bar there is no evidence that even Sanford ever professed to be speculating for the bank. And there is no appearance to that effect. The entries on their face constitute an appearance that the transactions were for Sanford. The defendants could not have relied upon any contrary appearance, for the good reason that there is no contrary appearance to rely upon. That left nothing, therefore, but the necessity of proving that Sanford had actual authority to speculate for the bank.

*Edwards & Odell*, attorneys, and *Walter Edwards* of counsel, for respondents argued:—

I. This action was originally brought for money had and received. The amended complaint charges further that the defendants have knowingly received plaintiff's money from their cashier for and on account of his private and individual transactions. This contention is denied in the answer, and is completely controverted by the evidence. The referee has found the contrary as a fact. There is no question but the transactions, as first commenced, were for plaintiff's account. The first transactions were in 1866. These were purchases and sales made over defendants' counter, and no separate entry of them appeared on defendants' books. Also let it be noted here that while the dealings began in 1866, the two earlier ledger accounts began November, 1867, and were ended by February, 1868, yet the checks upon which this action was originally predicated were drawn, two in May, 1868, and all the others in 1869. The accounts rendered by the plaintiff under the order for discovery show that in the years 1867, 1868 and 1869, defendants received cashier's checks drawn upon the plaintiff to the number

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Respondents' points.

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of one hundred, and aggregating about \$500,000. This action seeks to recover upon fourteen of these checks which have been selected by plaintiff's counsel after a careful and painstaking examination of all defendants' books which he has been allowed to have in his own office for weeks for this purpose. It seems pertinent to ask by what possible means could defendants have been led to suspect that these fourteen checks were improperly issued and the others rightfully. Where is the difference between these and the other eighty-six which is relied upon to charge these defendants with gross fraud in regard to these specified checks? The general term of this court has held in this case that: "The defendants dealing with the plaintiff had a right to assume that the cashier was acting under the plaintiff's authority." 37 *N. Y. Superior Ct.*, 297.

II. The claim made in the seventh cause of action set forth in the complaint, in effect charges the defendants with gross frauds; no less a charge, indeed, than that they were conspirators with Mr. Sanford to defraud the bank. Such a charge should be proved beyond a peradventure. Fraud is never presumed. On the contrary, the legal presumption is, that every man, and particularly every official, does that which it is his duty to do. *Rex v. Hawkins*, 10 *East*, 211; *Powell v. Millbourne*, 3 *Wilson*, 355; *Hartwell v. Root*, 19 *Johns.*, 345; *Bank of W. S. v. Dandridge*, 12 *Wheat.*, 69; *Continental National Bank v. Koehler*, 17 *State Rep.*, 23; *Spicer v. Spicer*, 54 *N. Y. Superior Ct.*, 280; *Shultz v. Hoagland*, 85 *N. Y.*, 464; *Bernheimer v. Rindskopf*, 116 *Ib.*, 428. The manner in which these dealings were conducted by the defendants repudiates all notion of fraud, conspiracy or knowledge of any wrong whatever, on the part of the defendants. All transactions were through the recognized messenger or runner of the Central National Bank, the plaintiff. All testimony agrees here, on behalf of defendants' and plaintiff's

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Respondents' points.

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witnesses, of two such runners, both well known in Wall street, or among banks and bankers, as being employed by plaintiff. All messages, orders and communications were through these persons. The checks received were immediately deposited and sent to the plaintiff in the usual, regular and best way. When Mr. Wheelock called on defendants every book was freely opened before him. There is no element indicative of fraud. No attempt at concealment of any kind. Only a dealing with a bank official, through the bank's well-known clerks and in the exact line of the officers' duty. Indeed, most of the dealings are confessedly for account of and acknowledged by the plaintiff—only fourteen out of a hundred checks are at all questioned.

III. Mr. Sanford was plaintiff's agent. The charge of all securities left with the plaintiff, selling such securities and purchases and sales of stocks, bonds, gold or securities for or on behalf of the bank or its customers, were confided to him and formed part of his official duty. Defendants dealt with him as representing the plaintiff and had a right to do so. It is well settled that where one of two innocent parties must suffer by reason of the acts of a third person, the loss must fall upon the one who has enabled such third party to occasion the loss. *Rawl v. Deshler*, 4 *Abb. Ct. of App. Dec.*, 12, and same case, 3 *Keyes*, 572; *Armour v. Mich. Cent. R. R. Co.*, 65 *N. Y.*, 111; *Bank v. N. Y., L. E. & W. R. R.*, 106 *Ib.*, 195. Plaintiff by placing Sanford in control of this part of its business put it in his power to do all he did. The defendants had all the dealings and received all the checks and paid out the money, relying upon the authority plaintiff had conferred upon Sanford. Plaintiff, whose agent Sanford was, and not defendants', must bear the loss caused by his wrong conduct. Such dealings on the part of a corporation have been repeatedly held as holding out their agents as fully authorized; and in such cases the

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corporation is bound on the ground of implied authority. *Hoyt v. Thompson*, 1 *Seld.*, 320; *Lohman v. Erie R. R.*, 2 *Sand.*, 39; *Gillett v. Campbell*, 2 *Den.*, 520.

IV. This action, in form, is to recover for the plaintiff money had and received by defendants. In other words, to recover the amount of certain cashier's checks drawn by Sanford and paid to the defendants. We allege that plaintiff has sustained no loss or damage by reason of said checks. Plaintiff's contention is that Sanford misappropriated these checks, paid them to defendants for his own purposes, and that defendants, knowing that the checks represented the bank's money, received them upon Sanford's private account, and thereby plaintiff has suffered damage in their amount, which they ask to recover herein. Coles, plaintiff's cashier, who succeeded Sanford, testified that all these checks were actually repaid to the plaintiff in money. Mr. Coles gives a detailed account of just how Sanford conducted his operations. He had charge of all bonds, stocks and securities left with plaintiff by its out-of-town customers. He sold these securities, and with the proceeds he made good his cashier accounts for all the checks he is alleged to have drawn improperly. The bank never sustained any loss until it met and paid the claim of these out-of-town correspondents for the securities so stolen by Sanford.

BY THE COURT.—GILDERSLEEVE, J.—The plaintiff, at the times hereinafter mentioned, was, and now is, a national bank, doing business in the city of New York. In June, 1866, William H. Sanford was its cashier, and continued as such until July, 1869. The defendants were, and now are, bankers and brokers in stocks and securities in this city. Between the dates above mentioned, plaintiff made purchases and sales of stocks securities and gold through the defendants. These dealings began prior to 1867 and continued until June,

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1869; they were managed and directed by Sanford, plaintiff's cashier, who gave all orders or directions to the defendants which were brought to defendants' office by the clerks or messengers of the plaintiff. In the course of said dealings, defendants were constantly receiving cashier's checks, being checks drawn by W. H. Sanford, Cashier, upon the plaintiff. The defendants received in such dealings upwards of one hundred of such checks, aggregating half a million of dollars. Those checks were immediately deposited by the defendants in their bank, and in the usual course of business presented to and paid by the plaintiff, through the clearing house. No question or objection to any of these checks was ever made until the commencement of this action. The plaintiff was in the habit of receiving from its customers stocks, bonds and securities, which were to be kept subject to their order. Such securities were in the custody and care of the cashier. On July 1, 1869, Sanford absconded. He had taken and appropriated to his own use all the stocks and securities. Subsequently the plaintiff was obliged to and did make good to its customers the value of such securities. All the cashier's checks paid to the defendants were entered on the cashier's account on the ledger of the plaintiff and on said account there were credits against each indicating that the same had been repaid to the plaintiff. These checks were all actually repaid to the bank, and Sanford's cashier account was kept good. The account of these dealings on the books of the defendants was headed "W. H. Sanford, Cashier," at first; subsequently on the ledger the word "Cashier" was omitted; one account was headed "W. H. Sanford, stock account;" one "W. H. Sanford, gold account;" and one account was headed "Central National Bank." All of the cashier's checks paid to defendants were re-paid to plaintiff, either by those made against other parties or by moneys paid to plaintiff by Sanford. This action seeks to recover upon fourteen of

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the checks out of the one hundred paid to defendants, as aforesaid, which have been selected by plaintiff's counsel after an examination of defendant's books. It is claimed by the plaintiff that the moneys represented by these cashier's checks, so paid to the defendants, were for use in Sanford's private stock speculations, and that defendants knew actually or constructively what Sanford was doing.

The action was brought in August, 1869, for money had and received by defendants for the use of the plaintiff. It was first moved for trial in 1887. When the trial was nearly completed, and in April, 1890, plaintiff by consent of the defendants, amended its complaint and added a seventh cause of action. In this it alleges that the defendants had transactions as stock-brokers, in which they received from one W. H. Sanford, various sums of money as security for services to be rendered or responsibilities to be incurred, or for stocks to be bought or sold by them; that said Sanford paid moneys to defendants in the course of such transactions by his own individual checks, and at other times by means of checks drawn by him upon the plaintiff as its cashier. The plaintiff further alleges that such cashier's checks could not be rightfully drawn or issued or used by Sanford save in the business of the plaintiff. But notwithstanding this, the defendants received certain cashier's checks, from Sanford in his individual transactions, and passed the same to his credit. It then sets forth several checks, aggregating \$62,521.88, that were received by the defendants. The complaint further alleges that the defendants well knew that Sanford was wrongfully abusing his authority, and was misappropriating moneys of the plaintiff by means of his power and authority as its cashier; and it demands judgment for the said several sums in the various causes of action set forth, aggregating upwards of \$139,000, and for interest thereon for upwards of twenty-one years. The answer of the

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defendants admits the receipts by them of each of the checks stated and set forth in the complaint, and alleges that each check was so received by them in the transactions had for and on account of, and at the request of the plaintiff. They further allege that they never knew or suspected that Sanford was dealing on his individual account until after his defalcation had been discovered, and the president of the plaintiff called upon defendants and so informed them.

It appears from the evidence that when plaintiff's president called upon defendants he was permitted to see Sanford's accounts, and informed defendants that Sanford had been speculating on his own account. Shortly after receiving this information from plaintiff's president, the defendants, discovering a certain balance in favor of Sanford, individually, with other brokers, brought an action against him and recovered about \$2,000 by default, upon the theory that the transactions in question were with Sanford individually, and that he was their customer, and not the bank, the plaintiff herein.

The first position taken by the learned counsel for the plaintiff, in support of his claim herein, is that this action by defendants against Sanford, the judgment therein entered, and the enforcement of that judgment against Sanford's individual property, constituted an election by defendants to consider Sanford as their customer in these transactions; that this election was final and conclusive, and precludes the defendants from insisting in this action that the plaintiff, and not Sanford, was the customer in these transactions in question. The learned counsel claims that this act of defendants established unalterably the important fact in respect of the identity of the party with whom the defendants were dealing; that by such act the defendants proclaimed Sanford to be their customer, the sole party with whom they were dealing; and that such act precludes them from contesting

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that question in this case. We are of opinion that this legal proposition of the learned counsel for the plaintiff cannot be sustained either by principle or by authority. The doctrine invoked is "the election of remedies." Are the defendants by claiming in this action that the transactions in question were with the plaintiff, violating any of the well-established principles common to questions of election? We think not, for the reason that there *has been no election in this* controversy. When the plaintiff's president gave the defendants information that induced them to proceed against Sanford, there was a debit balance of some two thousand dollars; for this the defendants certainly had a claim either against Sanford or the bank. Plaintiff's president told defendants Sanford was the man; therefore they sued him, and re-gained a portion of the money. No two inconsistent courses were then opened to the defendants, one of which they took, and the other of which is the course they now seek to take in this action. The doctrine of the election of remedies is not so elastic as to be stretched and made available beyond the point of precluding the defendants, having sued Sanford, from proceeding for the remainder of the balance against the plaintiff. Thus far we think it might be utilized. But it cannot be said to create a remedy in favor of the plaintiff, which did not before exist. The relation between the bank and the defendants was fixed before Sanford ran away, and plaintiff's president called upon the defendants. If the dealings had been with the bank, nothing that the plaintiff's president said to the defendants, and no action taken by the defendants in consequence, could change the existing relations. We cannot give our approval to the proposition that the defendants, by their election, not only waived a claim for \$2,000, which they might have urged against the bank, but also created a claim in the bank's favor for the amount of fourteen of these cashier's checks, selected from the

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hundred checks that the defendants had received during these transactions. We do not think that any of the numerous cases cited by the learned counsel for the plaintiff satisfactorily support the proposition. They do not go further than to hold that where a plaintiff has two inconsistent remedies and adopts one of them, *the same plaintiff* cannot have recourse afterwards to the other.

In *Fowler v. Bowery Savings Bank*, 113 *N. Y.*, 450, the bank paid money to which plaintiff was entitled to one Finch; on learning this, plaintiff sued Finch for money had and received. *Held*, by so doing, he ratified the act of the bank in paying Finch, and so could not afterwards disaffirm it and sue the bank. In *Tuthill v. Wilson*, 90 *N. Y.*, 423, which does not bear on the election of remedies, the court having decided the case on other grounds, it was held that the vendor could not enforce his claim against both the principal when discovered, and the agent who contracted in his behalf. In *Conrow v. Little*, 115 *N. Y.*, 387, plaintiff finding the vendee had acted fraudulently, sued him as for a debt and seized on attachment the very paper he had sold. *Held*, that this affirmed the contract of sale, and the defendant, the printer with whom the paper had been left to be printed upon, had and could hold his lien upon it as the vendee's property. In *Powers v. Benedict*, 88 *N. Y.*, 605, it was simply held that although an action to re-claim goods sold disaffirmed the contract of sale, yet still, if plaintiff only regains a portion, he may still follow the vendee for the balance of their value. In *Moller v. Tuska*, 87 *N. Y.*, 166, which was another case where plaintiff sued to regain possession of property rescinding the sale, it was *Held* that this was an election and prevented their making any claim against the vendee as such; in this case they followed the property in the hands of a fraudulent transferee from the vendee. In *Fields v. Bland*, 81 *N. Y.*, 239, it was *Held*, that the

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plaintiff, having taken a confession of judgment for goods sold and delivered, the judgment being confessed for the value of such goods, could not thereafter allege that the property, the same goods, belonged to him. In *Hughes v. Vermont Copper Mining Co.*, 72 *N. Y.*, 207, plaintiff brought an action in Vermont claiming damages as for a conversion of his alleged stock, the company having refused to recognize him as a stockholder. Subsequently he brought this action, claiming dividends on the same stock. *Held*, he had elected his remedy and treated the stock as converted, and he could not now sue, alleging ownership. In *Wright v. Wright*, 72 *N. Y.*, 149, plaintiff and defendant were heirs and next-of-kin of J. of whose estate defendant was administrator. Plaintiff drew two drafts on defendant which defendant paid, and on an accounting as administrator he credited himself with their amount as payments to plaintiff on account of his distributive share. Plaintiff brought this action for an account of the rent of real estate collected by the defendant. Defendant set up the sum paid on these two drafts as a counter-claim. *Held*, he had elected to consider them as paid out of the personalty and he could not apply them now to the realty. In *Dinsmore v. Duncan*, 57 *N. Y.*, 573, an action by Express Co. for conversion of a U. S. Treasury note, it was *Held*, that an indorsement by the owner to the secretary of the treasury for redemption destroyed its negotiability. That is all there is in this case—the doctrine of election is discussed by DWIGHT, Commissioner, and holds that the endorsement was an election to convert the note into bonds so that its negotiability was destroyed. In the case of *Morris v. Rexford*, 18 *N. Y.*, 552, an action for goods sold and delivered, plaintiff had before this suit brought an action of replevin and retaken the goods. *Held*, this was an election of his remedy and the present action could not be maintained. In *Thompson v. Fry*, 51 *Hun*, 296, a case submitted under section 1279 of the Code,

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the controversy was whether plaintiff, as assignee under a voluntary assignment in Ohio, was entitled to certain goods which had subsequently been attached by the defendant. Defendant had proved his claim under the assignment. *Held*, that he, at least, had accepted and was bound by the assignment.

It will be seen that none of the cases above referred to, cited by the counsel for the appellant, sustains the proposition which he seeks to establish in this case.

This question being disposed of adversely to the plaintiff, it remains to be seen whether or not the plaintiff established by the original facts that defendants had been dealing with Sanford as an individual. We think the findings of fact by the learned referee are amply supported by the evidence and fully warrant the decision he made. There are no exceptions to the admission or exclusion of evidence. The referee's conclusions upon the whole case, and the judgment entered in pursuance thereof, are correct.

The judgment appealed from is affirmed, with costs.

FREEDMAN, P. J., and DUGRO, J., concurred.

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FREDERICK MICHEL, ET AL., APPELLANTS v. JAMES  
B. COLEGROVE, RESPONDENT.

*Option for the purchase of mining property claimed by defendant as owner and sold. Plaintiffs claim a joint interest with defendant in said option and the proceeds of sale thereof, and demand an accounting, etc.*

This appeal is from a judgment entered upon the order of the court at special term, after an exhaustive trial, dismissing the complaint.

*Held*, that the complaint sets forth a good cause of action, and the right of the plaintiffs to recover depended entirely upon the evidence, and the most that can be said on behalf of plaintiffs is that there was a conflict of

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Opinion of the Court, by GILDERSLEEVE, J.

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evidence. The trial court, on the questions of fact, found adversely to plaintiffs, and its conclusions are fully sustained by a preponderance of evidence, and the judgment appealed from is affirmed.

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

Appeal from a judgment of the special term dismissing the complaint. The facts in the case appear from the opinion of the court.

*Henry Daily, Jr.*, attorney for appellants.

*Thornall, Squires & Pierce*, attorneys, and *Franklin Pierce* of counsel, for respondent.

BY THE COURT.—GILDERSLEEVE, J.—In May, 1886, the defendant had and controlled an option for the purchase of a certain mining property, in Colorado, known as the "Caledonia," at a stipulated sum. It was the purpose of the defendant to find a purchaser for the property before the expiration of the option, at a price that would yield him a profit. Before the option expired, the property was sold to the "Caledonia Gold Syndicate, Limited," a corporation organized under the laws of Great Britain, having its place of business in the city of London, England. The plaintiffs bring this action upon an alleged agreement, which, they claim, was entered into between them and the defendant, by which the three became jointly interested in the sale of said mining property. The complaint alleges that it was understood and agreed that each one of them should give his time and attention and best efforts to accomplishing the sale of said mining property, and that all profits and gains, over and above actual and necessary disbursements, should be divided into three equal parts, and that the plaintiffs and defendant should each receive

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one of said parts. The complaint further alleges that the gains and profits, over and above all necessary and actual expenses attending said sale, amounted to the sum of sixty thousand dollars, which sum the defendant received on behalf of plaintiffs and himself, and it demands judgment that the defendant account to the plaintiffs for said sixty thousand dollars, and be directed to turn over to the plaintiffs such portions of said profits as they are entitled to receive under the conditions of the aforesaid agreement. The answer denies all the material allegations of the complaint, and sets up a counter-claim for moneys loaned to plaintiffs and services rendered to them. The counter-claim does not appear from the record to have been litigated.

The case was tried at special term, and, after an exhaustive trial, at which a large amount of evidence was introduced by both sides, the court below ordered judgment in favor of the defendant, dismissing the complaint upon the merits. From this judgment the plaintiffs appeal.

The complaint sets forth a good cause of action, and the right of the plaintiffs to recover depended entirely upon the evidence. After a careful examination of the record, the most that can be said on behalf of the plaintiffs is that there was a conflict of evidence.

The trial court, on the questions of fact, found adversely to the plaintiffs; and we are of opinion that the conclusions are fully sustained by a strong preponderance of evidence. The learned counsel for the appellants urges several exceptions to the admission or exclusion of evidence as valid; but an examination of the questions raised by these exceptions fails to disclose any error prejudicial to plaintiffs.

The judgment appealed from should be affirmed, with costs.

FREEDMAN, P. J., and DUGRO, J., concurred.

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Opinion of the Court, by GILDERSLEEVE, J.

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**FREDERICK MICHEL, ET AL., APPELLANTS v. JAMES  
B. COLEGROVE, RESPONDENT.**

*Judgment, motion to vacate, and to suppress the deposition of a witness  
improperly obtained.*

The motion was founded upon affidavits. The court below held that such a motion should be made upon a case and exceptions, as well as the affidavits, and therefore denied the motion with leave to renew upon such case. *Held*, that the court below correctly indicated the practice to be followed in such a case, and that the order was properly granted.

**Before DUGRO and GILDERSLEEVE, JJ.**

*Decided July 5, 1892.*

Appeal from an order of the special term, dated November 12, 1891, denying plaintiffs' motion to set aside a judgment of the special term and suppress the deposition of a witness, with leave to renew on case and exceptions, in addition to affidavits.

*Henry Daily, Jr.*, attorney for appellants.

*Thornall, Squires & Pierce*, attorneys, and *Franklin Pierce* of counsel, for respondent.

**BY THE COURT.**—GILDERSLEEVE, J.—This order denied the motion of plaintiffs to set aside the judgment of the special term herein, and to suppress the deposition of one George Battelson, with leave to renew the motion, so made, upon a case and exceptions, in addition to the affidavits, upon which alone the motion was made.

Plaintiffs' motion was founded on affidavits setting forth the fact that since the entry of the judgment here-

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Opinion of the Court, by GILDERSLEEVE, J.

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in plaintiffs had learned that defendant, who had caused the testimony of one Battelson to be taken by commission in London, had, previous to the execution of the commission, written said Battelson a letter, enclosing a copy of the interrogatories, and indicating the answers that said witness should give, which instructions were duly followed by said witness; and plaintiffs asked to have said deposition suppressed and the judgment set aside on this newly-discovered evidence. The court held that such a motion should be made on a case and exceptions, as well as the affidavits setting forth the nature of the newly-discovered evidence, and denied the motion, with leave to renew on such case.

We are of opinion that the court below correctly indicated the practice to be followed in such a case, and that the order was properly granted. *Holmes v. Evans*, 13 *N. Y. Supp.*, 610; *Anonymous*, 7 *Wend.*, 331; *Warner v. Western Transportation Co.*, 5 *Robt.*, 499; see also, *Russell v. Randall*, 123 *N. Y.*, 436.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

DUGRO, J., concurred.

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Statement of the Case.

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**FREDERICK MICHEL, ET AL., APPELLANTS v. JAMES  
B. COLEGROVE, RESPONDENT.**

*Motion to vacate a judgment and to suppress the deposition of a witness taken by commission made upon a case and exceptions and affidavits.*

This is the case reported *ante*, page 278, the motion being renewed on a case and exceptions, as well as affidavits, at the special term, as suggested in the decision of the former motion.

*Held*, that the action of defendant in regard to the execution of the commission, taking the testimony of one Battelson in the case, indicates a disregard of the proprieties that all honorable men observe in the conduct of any litigation, however bitter, and is a trespass upon the code of ethics, which should control under such circumstances, and calls for severe condemnation by this court. The conduct of the defendant in this respect is inexcusable. But from a careful examination of all the evidence it does not appear that such action was a wrong from which defendant derived any benefit, and, therefore, his conduct does not afford sufficient ground or reason to entitle the motion to prevail.

*Held*, that the plaintiffs are estopped from the relief sought, by reason of their *negligence and laches*. The testimony of the witness was not controlling, it was only cumulative, and there is enough in the case, without the testimony of this witness, to sustain the judgment. A new trial cannot be obtained either for the purpose of furnishing new and additional cumulative evidence, nor for the purpose of destroying the cumulative evidence of the successful party. This rule is well settled, that if a witness examined on commission is instructed by the party in interest how to testify, the commission will be suppressed at the instance of the adverse party, on the ground that such conduct is prejudicial to him, corrupting to the witness, an abuse of process and a fraud on the court, interfering with pure administration of justice. But suppressing a commission in advance of the trial and granting a new trial after judgment, are quite different things. A judgment is intended to terminate a litigation and to conclude the parties as to every question raised or which might have been raised before the final result was reached, and rights so lost may never be regained.

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

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Opinion of the Court, by GILDERSLEEVE, J.

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Appeal from an order of the special term, denying plaintiffs' motion to set aside a judgment of the special term and to suppress the deposition of a witness, which order bears date March 24, 1892.

*Henry Daily, Jr.*, attorney for appellants.

*Thornall, Squires & Pierce*, attorneys, and *Franklin Pierce* of counsel, for respondent.

BY THE COURT.—GILDERSLEEVE, J.—This is an appeal from an order of the special term, by Judge McADAM, dated March 24, 1892, denying plaintiffs' motion to suppress the deposition of one George Battelson, taken under a commission, and to set aside a judgment of the special term, entered herein, and for a new trial. This motion was made upon a case and exceptions, and upon affidavits setting forth the fact that since the entry of the judgment herein plaintiffs had learned that defendant, who had caused the testimony of one Battelson to be taken by a commission in London, had, previous to the execution of the commission, written said Battelson a letter, enclosing a copy of the interrogatories, and indicating the answers that said witness should give, which instructions were duly followed by said witness. In an affidavit, one of the plaintiffs stated that said Battelson informed him, when in London, subsequent to the trial herein, that before the execution of said commission he, said Battelson, received said letter from defendant, and answered the interrogatories as directed by defendant. The defendant, in his affidavit, used in opposition to the motion, admits the writing of the letter to Battelson, but disclaims any intention to direct Battelson in the answers he was to make to the interrogatories, or in any way to influence him. He further says, by way of explanation, that he had personal knowledge of all the facts stated in his letter, and that he also knew

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that Battelson knew the same facts; and he positively swears that each and every one of the answers of Battelson to the interrogatories in question was true; and that the occasion of writing the letter arose from a letter written to him by Battelson, in which Battelson set forth the facts as to which he subsequently testified, under the commission, and asked him, defendant, to suggest the form of answers to be used by him, said Battelson; and that said letter was written by defendant without any consciousness, at the time, that it was improper or indelicate for him to suggest the forms of the answers, and without any intent whatever of, in any way, influencing the evidence of said Battelson.

This letter of the defendant certainly indicates a disregard of the proprieties that all honorable men observe in the conduct of any litigation, however bitter, and is a trespass upon the code of ethics, which should control under such circumstances, that calls for severe condemnation by this court. *In re Eldridge*, 82 *N. Y.*, 161; *Butler v. Flanders*, 44 *N. Y. Super. Ct. R.*, 531; *Graham v. Carlton*, 9 *N. Y. Supp.*, 392. We deem the conduct of the defendant in this respect inexcusable. But, from a careful examination of all the evidence, we are not satisfied that it was a wrong from which the defendant derived any benefit. This conduct of the defendant, therefore, does not afford sufficient reason to entitle the motion to prevail.

The plaintiffs knew two years before the trial that a commission had been issued for the examination of Battelson, and they knew what answers he had made to the several interrogatories. Yet no motion was made to suppress. The excuse is that the facts were not known until after the trial; but could they not, by the exercise of proper diligence, have been discovered before? It is reasonable to suppose they could have been; and, therefore, the plaintiffs are estopped from the relief sought, by reason of their negligence and *laches*. *Bay-*

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lies' *New Trials and Appeals*, pp. 524, 525, and cases there collected; *Quinn v. Lloyd*, 31 *N. Y. Super. Ct.*, 255; *Smith v. Nelson*, 62 *N. Y.*, 288. If the least fault be imputable to the plaintiffs, they will ask for relief in vain. 3 *Graham & Watterman*, 1026; *Weston v. N. Y. El. Ry. Co.*, 42 *N. Y. Super Ct.*, 162.

Again, the testimony was not controlling, but cumulative; and there is enough in the case, without the testimony of said Battelson, to sustain the judgment rendered. There is no reason to believe that Battelson would testify differently, if re-examined; nor is there any reasonable certainty that a new trial would produce a different result.

The disclosures made by the evidence, upon which the plaintiffs rested their motion, would be of no value upon a new trial, except by way of affecting the credibility of Colegrove, and Battelson. A judgment will not be vacated for the purpose of allowing the defeated party to attack the credibility of the witnesses of the successful party, or to contradict them, or to show that they have testified falsely. *Smith v. Lowrey*, 1 *Johns.*, Ch., 320; *McIntire v. Young*, 39 *Am. Dec.*, 447; *Starin v. Kelly*, 47 *N. Y. Super. Ct.*, 291; *Emmerich v. Hefferan*, 53 *Ib.*, 98. The plaintiffs now seek to destroy the judgment by removing or destroying the cumulative, corroborative evidence in Battelson's deposition. But a new trial cannot be obtained either for the purpose of furnishing new cumulative evidence, or for the purpose of destroying the cumulative evidence, of the successful party. See *Baylies' New Trials and Appeals*, 525, and cases there collected.

We quote, with entire approval, from the decision of Judge McADAM, in disposing of this motion: "This rule is settled that if a witness examined on commission is instructed by the party in interest how to testify, the commission will be suppressed, at the instance of the adverse party, on the ground that such conduct is preju-

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dicial to him, corrupting to the witness, an abuse of process, and a fraud on the court, interfering with pure administration of justice. But suppressing a commission, in advance of the trial, and granting a new trial after an adverse judgment, is quite a different thing. A judgment is intended to terminate a litigation and to conclude the parties as to every question raised or which might have been raised before the final result was reached, and rights so lost may never be regained."

For the reasons above stated, it follows that the order appealed from must be affirmed, with ten dollars costs, and disbursements.

FREEDMAN, P. J., and DUGRO, J., concurred.

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THE PEOPLE, *EX REL.* RICHARD BURNS, RELATOR,  
APPELLANT *v.* HENRY D. PURROY, ET AL., FIRE  
COMMISSIONERS, ETC., RESPONDENTS.

*Certiorari, writ of, reviewing the proceedings of fire department on trial of relator.*

Relator was a member of the fire department of the city of New York. On charges preferred against him for assault on a superior officer, he was tried before the board of fire commissioners, found guilty and dismissed from the force.

- On the review on appeal, *Held*, that the respondents had jurisdiction to make the order. They complied with all the formalities required by the statute. The preponderance of evidence indicates that the relator was guilty of an act of insubordination and breach of discipline and "*conduct injurious to the public peace and welfare*," that sustains the conclusions of the commissioners as to his guilt, and for which, under section 440 of the Consolidation Act he could be dismissed from the force. Section 2141, of the Code of Civil Procedure, authorizing the court, upon a hearing on return to a writ of certiorari, "*to make a final order annulling*
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Opinion of the Court, by GILDERSLEEVE, J.

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*or confirming wholly or partly, or modifying the determination reviewed'' do not authorize the review or modification of the determination of inferior jurisdiction, in matters within their jurisdiction, which are confided to their discretion.*

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

*Louis J. Grant*, for relator, appellant.

*William L. Findley*, for respondents.

BY THE COURT.—GILDERSLEEVE, J.—The relator was a member of the fire department of the city of New York. Charges were preferred against him of committing two separate assaults on a superior officer, when called to duty by said superior officer, at the quarters of engine company 29, on August 4, 1891. He was tried before the board of fire commissioners, found guilty, and dismissed from the force.

If the relator was guilty of the misconduct charged against him, the respondents had jurisdiction to make the order dismissing him from the force. *Consolidation Act*, § 440. As far as the evidence shows, they complied with all the formalities required by the statute. The inquiry was before the board of commissioners; the charges were in writing; the examination was public; the accused had due notice thereof, and was present, and took part in the investigation; and the trial was conducted in a fair and impartial manner. § 440, *supra*. That the two men, relator and his said superior officer, fought at the quarters of engine company 29, when the former was ordered by the latter to duty, is not disputed; but each claims that the other was the aggressor. The relator was found guilty of a charge, which clearly amounted to a "breach of discipline" and "conduct injurious to the public peace and welfare," for which, under

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Opinion of the Court, by GILDERSLEEVE, J.

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section 440 of the *Consolidation Act*, he could be dismissed from the force. The preponderance of evidence indicates that the relator was guilty of an act of insubordination and breach of discipline, that was not justified by the circumstances of the case, and sustains the conclusions of the commissioners as to his guilt.

If the board of commissioners were warranted in finding the relator guilty, as we think is the fact, they were authorized to determine the nature and extent of the punishment, within the limits of the statute, and that determination is not reviewable here. The provisions of section 2141 of the Code of Civil Procedure, authorizing the court, upon a hearing on return to a writ of certiorari, "to make a final order annulling or confirming wholly or partly, or modifying, the determination reviewed," do not authorize the review or modification of the determination of inferior jurisdictions in matters, within their jurisdiction, which are confided to their discretion. *People ex rel. Kent v. Board of Fire Commissioners*, 100 *N. Y.*, 82.

And if it were within our power to modify the mode of punishment, we should be very cautious in exercising that power. The government of the fire department assimilates to that required in the control of the police force, or in the control of a military body, and the interference of an extraneous power in its practical control and direction must, as a general rule, be mischievous and destructive of the discipline and habits of obedience which should govern its subordinate members. *People ex rel. Masterson v. French*, 18 *N. Y. State R.*, 234.

We are of opinion that the writ must be dismissed, and the judgment of the board of fire commissioners affirmed, with fifty dollars costs and disbursements.

FREEDMAN, P. J., and DUGRO, J., concurred.

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Statement of the Case.

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**GEORGE H. STUDWELL, ET AL., APPELLANTS v.  
THE MUTUAL BENEFIT LIFE ASSOCIATION  
OF AMERICA, RESPONDENT.**

*Life insurance, policy of—Application for insurance and statements therein and the by-laws referred to in the policy and made a part thereof, must be considered as one instrument with the policy.*

This action was brought to recover from defendant the sum of \$10,000, upon a policy of insurance upon the life of Charles H. Hyde, payable upon his death to the firm of Studwell, Sanger & Co., of which firm plaintiffs are the sole surviving partners.

The application for insurance, and the statements therein, and the by-laws of respondent, by the terms of the policy were made a part of the contract of insurance between Hyde and the defendant. The defence was based upon alleged misrepresentations in the application for insurance or the suppression of facts therein which should have been stated. In the application Mr. Hyde made this declaration: "That the foregoing application and this declaration, together with the answers and explanation given to the above various questions, and inclusive of those propounded by the medical examiner on the within pages hereof, shall form the exclusive and only basis of the agreement of the above-named applicant and the Mutual Benefit Life Association of America, and that if any misrepresentations or fraudulent or untrue answers or statements have been made, or if any facts which should have been stated to the association have been suppressed therein, \* \* \* or should the applicant fail to comply with any of the terms of this agreement, or with any of the conditions and agreements contained in the certificate of membership, \* \* \* then this agreement shall become null and void, and all moneys which shall have been paid shall be forfeited to the said Association for its sole benefit." At the conclusion of the statement made to the medical examiner, Mr. Hyde further says: "I hereby further declare that I have read and understand all of the foregoing questions put to me by the medical examiner, and the answers thereto, and that the same are warranted by me to be true." In the application for insurance this question was asked of Mr. Hyde: "What amounts are now insured on your life, and in what companies? A. \$10,000 'Family Fund.'" The plaintiffs' proofs of death submitted to the defendant show that Mr. Hyde had \$10,000 insurance in the "Mutual Life Insurance Company of New York." Defendant's "Exhibits B, C, E and F"

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Statement of the Case.

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are conclusive evidence of the falsity of this statement. They show that on January 30, 1868, and several years prior to the application made to the defendant, Mr. Hyde took out two policies of insurance in the "Mutual Life Insurance Company of New York" for \$5,000 each, and that the same were in full force right along up to the time Mr. Hyde died, and that the amounts insured by said policies were actually paid to Mr. George H. Studwell, one of the plaintiffs in this action, on the 24th day of January, 1890. These policies were offered and received in evidence, and the fact that, in addition to the insurance mentioned by Mr. Hyde in his application, he was also insured at the time of that application for the sum of \$10,000 in the "Mutual Life Insurance Company of New York" is not disputed. The answer upon its face appeared to be complete, and it does not, therefore, come within the rule of those cases which hold that where an answer is manifestly incomplete upon its face, the insurers will be deemed to have waived the right to a more complete answer if they make no further inquiry in relation thereto. This answer was complete and full upon its face, and there was nothing in it which could have possibly required, induced or provoked further inquiry in relation to the subject matter of this particular question. At the conclusion of the evidence defendant moved to dismiss the complaint upon the ground, among others, that Mr. Hyde, in his answers made and contained in the application, suppressed the fact that he was insured in the Mutual Life Insurance Company for \$10,000, and the trial judge dismissed the complaint solely upon that ground.

*Held, on appeal*, that the policy in suit and the application therefor constituted the contract for insurance between Charles H. Hyde and defendant. The evidence disclosed, and it incontestably appeared, that a material fact had been suppressed which should have been stated to the association under the contract, and there could be no other reasonable conclusion than that he knew of the existence of the policies from the Mutual Life Insurance Company and intentionally suppressed the fact. It would be unreasonable to call upon defendant, years after these policies had been issued and the facts that had transpired leading to their issue had occurred, to give positive and direct proof of the intentional omission on the part of the insured of a fact which by the terms of the contract the insured had agreed to place in defendant's possession, and it follows that plaintiffs were not entitled to recover, and the dismissal of the complaint did not constitute error.

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

Appeal from judgment of the trial term dismissing the complaint.

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Opinion of the Court, by GILDERSLEEVE, J.

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*Kopper & Jenks*, attorneys, and *Daniel Clark Briggs* and *William W. Jenks* of counsel, for appellants.

*E. T. Lovatt*, attorney and of counsel, for respondent.

BY THE COURT.—GILDERSLEEVE, J.—In February, 1876, the plaintiffs herein and one Charles H. Hyde were copartners. On the 10th day of January, 1890, said Hyde died, leaving the plaintiffs sole surviving partners of said firm. On the 6th day of January, 1887, Hyde was a debtor to said firm in a large sum of money, which indebtedness increased from time to time, and at his death amounted to upwards of \$20,000. On said 6th day of January, 1887, the defendant-corporation issued a policy of insurance or certificate of membership to said Charles H. Hyde for \$10,000, payable upon his death to the firm of Studwell, Sanger & Co., of which firm the plaintiffs herein are the sole surviving partners. This action was brought to recover the sum of \$10,000 upon said policy of insurance, or certificate of membership, issued as aforesaid. The application, signed by Hyde, for the policy in question, contains the following statement: "That the foregoing application and this declaration, together with the answers and explanations given to the above various questions, and inclusive of those propounded by the medical examiner on the within pages hereof, shall form the exclusive and only basis of the agreement of the above-named applicant and the Mutual Benefit Life Association of America, and that if any misrepresentations or fraudulent or untrue answers or statements have been made, or *if any facts which should have been stated to the Association have been suppressed therein*, \* \* \* or should the applicant fail to comply with any of the terms of this agreement, or with any of the conditions and agreements contained in the certificate of membership, \* \* \* *then this agreement*

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Opinion of the Court, by GILDERSLEEVE, J.

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*shall become null and void*, and all moneys which shall have been paid shall be forfeited to the said association for its sole benefit." At the conclusion of the statement made to the medical examiner, Mr. Hyde further says: "I hereby further declare that I have read and understand all of the foregoing questions put to me by the medical examiners, and the answers therein, and that the same are warranted by me to be true." The by-laws are also made a part of the policy. Section 21 of the by-laws states "If any person secures membership by concealing or suppressing any material facts, or if the statements in the application for membership \* \* \* are in any respect untrue, the membership shall cease and all payments shall be forfeited to the association." The policy in suit and the application therefor constituted the contract of insurance between Charles H. Hyde and the defendant (*May on Insurance*, § 158), and must be construed as one instrument. *Mutual Ben. L. Ins. Co. v. Miller*, 2 *Ins. L. J.*, 101; *Lycoming Mut. F. Ins. Co. v. Sayler*, 67 *Pa.*, 108; *Burritt v. Saratoga Co. Mut. F. Ins. Co.*, 5 *Hill*, 188; *Pierce v. Empire Ins. Co.*, 62 *Barb.*, 636; *Vose v. M. Ins. Co.*, 6 *Cush.*, 42; *Chaffee v. Catt. Co. Mut. Ins. Co.*, 18 *N. Y.*, 378; *France v. Ætna L. Ins. Co.*, 2 *Ins. L. J.*, 657; *Angell on Ins.*, § 141.

In the application for insurance, this question was asked of Mr. Hyde: "Q. What amounts are now insured on your life, and in what companies? A. \$10,000, Family Fund." The plaintiffs' proofs of death submitted to the defendant show that Mr. Hyde had \$10,000 insurance in the Mutual Life Insurance Company of New York; they show that on January 30, 1868, many years prior to the application made to the defendant, Mr. Hyde took out two policies of insurance in the Mutual Life Insurance Company of New York, for \$5,000 each, and that the same were in full force up to the time Mr. Hyde died, and that the amounts insured by said

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Opinion of the Court, by GILDERSLEEVE, J.

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policies were actually paid to Mr. George H. Studwell, one of the plaintiffs in this action, on the 24th day of January, 1890. These policies were received in evidence upon the trial, and established the fact beyond dispute that in addition to the insurance mentioned by Mr. Hyde in his application, namely, \$10,000 in Family Fund, he was also insured, at the time of making said application, in the sum of \$10,000 in the Mutual Life Insurance Company of New York. At the conclusion of the evidence the learned counsel for the defendant made a motion to dismiss the complaint upon the ground, among others, that Mr. Hyde in the answers to questions made to defendant and contained in the application for the insurance in question, suppressed the fact that he was insured in the Mutual Life Insurance Company for \$10,000. The learned trial judge dismissed the complaint upon that ground, without passing upon the other grounds urged.

The evidence disclosed an undisputed suppression of fact. One of the stipulations contained in the agreement between Mr. Hyde and defendant, which constituted the contract of insurance upon which this action was brought, is as follows :—" Or if any facts, which should have been stated to the association, have been suppressed therein, \* \* \* then this agreement shall become null and void." There was nothing to go to the jury upon this point. It incontestably appeared that a material fact had been suppressed.

The only remaining question was this :—Was the fact intentionally suppressed? On this point the learned trial judge, in disposing of the motion to dismiss, said : "The jury could not find to the contrary. If a man knows, is in possession of his senses, and his intellect is directed to a particular thing, he may not tell us an untruth, conscious that it is untrue, as matter of business." This answer appeared on its face to be complete ; it did not, however, contain the whole truth, and in that re-

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Opinion of the Court, by GILDERSLEEVE, J.

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spect it was false. Mr. Hyde's omission to disclose the existence of the policies in the Mutual Life Insurance Company was clearly a suppression of "facts which should have been stated to the association." A man is presumed to intend the natural consequences of his acts. Mr. Hyde's act of omission in this respect deprived the defendant of material information. There could be no other reasonable conclusion from the act itself, from the existence of the policies at the time of his death, and other proof in the case, than that he knew of their existence and intentionally suppressed the fact. "Where an answer of the applicant to a direct question of the insurer purports to be a complete answer to the question, any substantial mis-statement or omission in the answer voids the policy issued upon the face of the application." *Phoenix Mut. Life Ins. Co. v. Raddin*, 120 *U. S.*, *N. S.*, 183; 7 *Sup. Ct. Rep.*, 500. "Where the answer of an applicant to a direct question purports to be a complete answer, any material mis-statement or omission in the answer voids the contract." *Cook on Life Ins.*, p. 34, § 18. In the case of *Towne v. Fitchburg Ins. Co.*, 7 *Allen*, 51, which was an action on a fire insurance policy, that provided that the application therefor should contain a full, fair and substantially true representation of all the facts and circumstances respecting the property, the insured having mentioned only one mortgage as being upon the property, when there were in fact two, it was *Held*, that this suppression of fact voided the policy, and that the fact that the insured did not then recollect the other mortgage was immaterial. Any other rule would be unnecessarily severe, and might often work great hardship to insurance corporations.

It would be unreasonable to call upon defendant, years after policies of insurance had been issued, and the facts that had transpired leading up to their issue had occurred, to give direct proof of the intentional omission on the part of the insured of a fact which, by the terms

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Statement of the Case.

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of the contract, the insured had agreed to place in defendant's possession.

For the reasons above stated, it follows that plaintiffs were not entitled to recover, and that the dismissal of the complaint did not constitute error. It is unnecessary to discuss the question of warranty.

We are of opinion that the judgment appealed from should be affirmed, with costs.

FREEDMAN, P. J., and DUGRO, J., concurred.

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KATE FLYNN, AS ADMINISTRATRIX, ETC., APPELLANT  
v. GEORGE HARLOW, RESPONDENT.

*Negligence of master as distinguished from negligence of fellow-servants.*

On or about August 25, 1888, the defendant, as contractor and builder, was erecting and constructing a house on premises in West 83d street, New York City, and plaintiff's intestate, Charles Flynn, was employed as a day-laborer on this building. His service at the time of the accident was the removal of brick and mortar, contained in hods, from an elevator machine which carried the materials from the ground to the several floors above, and he was engaged on the 4th floor in taking the hods from the elevator and dumping the contents upon a scaffold near the elevator, for use in building the front wall of said house; and while the intestate was so employed the floor-beams gave away and precipitated the materials that had been deposited near the elevator upon the floor beneath, and carried it and all the other floors below, with their contents, down to the cellar. The deceased intestate fell with the floors and was thereby killed.

This action was brought to recover damages for the death of plaintiff's intestate, on the ground of the defendant's negligence and want of care and skill in the construction of said building, and in negligently and carelessly overloading the beams and girders of said building with brick and mortar and other building materials. When the plaintiff rested her case, the court below dismissed the complaint on the ground that there was no evidence of any negligence on the part of the defendant, but that what-

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Opinion of McADAM, J.

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ever negligence there was in the premises attached to the plaintiff's intestate and his fellow-workmen.

*Held*, that the complaint having been dismissed on defendant's motion after the close of plaintiff's case, without any testimony whatever on the part of defendant, all the evidence contained in the record must be taken as true for the purposes of this appeal, and appellant is entitled to have every doubtful fact found in her favor; *also*, that the only inference that can be drawn from the evidence, as to the cause of the accident, is that it was occasioned by overloading the fourth story with brick and mortar, which were brought up from the ground and placed upon the floor of the fourth story, under orders from the defendant, or from his foreman and agent with the knowledge of defendant; that the quantity of the material that could be safely placed upon the fourth and other floors was not a question for decision in the discretion of the laborers, of whom the intestate was one, and, therefore, the overloading of the floor was not an error of judgment on the part of said laborers, who were charged simply with the duty of taking from the elevator the materials sent up by direction of the defendant or his foreman. The defendant and his foreman must be presumed to have known the quantity of brick and mortar that could be safely placed upon the fourth floor. The evidence did not justify the conclusion of the trial judge. It was not due or owing to the want of judgment on the part of the laborers, of whom the intestate was one. The intestate was free from contributory negligence, for he and his fellow-workmen were obeying the orders of defendant, or his agent, and defendant was present and saw the work going on. The intestate was merely carrying out the orders of defendant, who must be presumed to have had a fair and reasonable knowledge of the business in which he was engaged, which includes a knowledge of at least the approximate strength of the floor timbers he had placed in the building, and a knowledge of the approximate weight of twelve or thirteen thousand bricks and the mortar he had accumulated upon that floor. It was the duty of the trial judge to have submitted the case to the jury.

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

Appeal from a judgment entered upon the dismissal of the complaint at trial term.

The facts and points appear fully in the opinion of the court, and in the following opinion of the trial judge:—

“McADAM, J.—There is no proof of defective con-

struction of the building, nor of any violation of law. There is no evidence of intentional overloading by the defendant. The act of overloading, if done at all, was done by Flynn, the deceased, and the other workmen, who, by their own indiscretion, brought upon themselves the trouble of which complaint is now made. They cannot charge the consequences upon the defendant. In order to hold him, it is necessary to prove affirmatively that the injuries were caused by the negligence of the defendant, and that deceased was entirely free from any fault contributing to the accident.

“It does not appear that the defendant did anything he ought not to have done, or failed to do anything he ought to have done, or that any conduct of his resulted in injury to any one. Negligence is not to be inferred from the mere fact of an injury or an accident, but must be affirmatively alleged and proved. The proofs show that if Flynn and his fellow-workmen did not bring the misfortune upon themselves by their indiscretion, they, by their conduct, at least contributed in bringing about the result. The overloading was done by them and by no one else. They do not appear to have been dominated, directed or controlled by the defendant.

“The evidence is insufficient to establish the charge of negligence on the part of the defendant, and the complaint in consequence must be dismissed.

“A party overloading a building is liable to any one injured by the overloading, but the right to recover does not belong to one of the overloaders, if he is *particeps criminis*. If the overloading resulted from indiscretion, it was the want of judgment of the men, of whom Flynn was one; they were employes of the defendant, they were fellow-workmen of Flynn, and it is elementary law that a master is not liable for the errors, mistakes, want of judgment or negligence of fellow-workmen.

“The complaint will, therefore, have to be dismissed.”

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Appellant's points.

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*H. Warren Love*, attorney, and *Paul Jones* of counsel, for appellant argued:—

I. The dismissal of the complaint having been made upon the defendant's motion after the close of the plaintiff's case, without any testimony whatever, on defendant's behalf the facts contained in the record must be taken as true for the purpose of this appeal, and the appellant is entitled to have every doubtful fact found in his favor. *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 *N. Y.*, 491; see also *Wylie v. Marine National Bank*, 61 *Ib.*, 415.

II. It having been shown that the accident, through which the death of the plaintiff's intestate was occasioned, was caused by overloading the floors of the building where he was at work, and that he was there in the performance of the work assigned him by the direction of the defendant's foreman, and was, at the time, under the personal supervision of the defendant himself, it is submitted that there was sufficient evidence of negligence on the defendant's part to justify the court in granting the plaintiff's motion to send the case to the jury, notwithstanding the ruling already made upon the defendant's motion to dismiss. While indeed the master is not an insurer of the safety of the place where the servant is required to work, not of the tools, implements and appliances given him for the performance thereof; it is nevertheless true, that the law imposes upon the master certain duties and obligations respecting the servant, by which he is bound to use reasonable care to see that the place where the servant is assigned to work is safe. *McGovern v. C. V. R. R. Co.*, 123 *N. Y.*, 280; *Pantzer v. Tilly Foster Mining Co.*, 99 *Ib.*, 368; *Davidson v. Cornell*, 10 *N. Y. Supp.*, 521. It is therefore the master's duty to furnish all reasonable means to secure the safety of his employes. *Pantzer v. Tilley Foster Mining Co.*, *supra*. So, an employer being bound to furnish a safe place and suitable instrumentalities in and

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Appellant's points.

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by means of which to do the work assigned to an employe, it is wholly immaterial, upon the question of the master's liability for damages, by whom the place was assigned, or the instrumentality was furnished or constructed, so long as it was assigned or furnished in the master's behalf. *Ryan v. Miller*, 12 *Daly*, 77. Hence, where the direction of the work is given to a foreman, he represents the master, and the latter is liable for any injury to an employe, resulting from a want of care in his directions. *Sheehan v. N. Y. Cent., etc., R. R. Co.*, 91 *N. Y.*, 332. And the master's duty to make suitable provisions for the safety of employes cannot be delegated. *Fuller v. Jewett*, 80 *N. Y.*, 549; *Flike v. R. R.*, 53 *Ib.*, 549; *Bushby v. R. R.*, 107 *Ib.*, 37. And where it is shown that an employe is killed without any fault on his part, in consequence of the breaking of an appliance, or by reason of the defective construction of the place where the work is done, or by any imperfection in the tools furnished by the master, the case can only be taken from the jury, and a nonsuit ordered, where there is room for doubt, upon the evidence, not only that the master used due care in the construction or selection of the place, appliances or tools, in the first instance, but also that he used the further care that they should continue to be safe. *Ficks v. Sweney M'fg Co.*, 58 *Hun*, 611. And where in such case the accident and the injury resulting therefrom is proved, negligence is presumed to such an extent, as to warrant the submission of the case to the jury. *Flynn v. Gallagher*, 52 *N. Y. Super. Ct.*, 524; *Dobbins v. Brown*, 119 *N. Y.*, 188.

III. While the record shows no positive proof of the absence of contributory negligence upon the plaintiff's part, the rule, that the plaintiff must show that he has not contributed to the accident, by any act of negligence on his part, in order to hold the defendant liable for damages occasioned by his negligence, does not necessarily impose upon him the duty to furnish positive

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Appellant's points.

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proof of the absence of such negligence ; but, in any event, the rule does not apply to the facts of the case at bar. In actions for the recovery of damages for personal injury, the character of the defendant's negligence may be such as to prove the whole issue. It cannot, therefore, be said, as a universal rule, that it lies upon the plaintiff to prove affirmatively that he was not guilty of negligence, or upon the defendant to prove the contrary, in order to establish his defence. The absence of any fault may be inferred from the circumstance. *Johnson v. H. R. R. Co.*, 20 *N. Y.*, 65 ; *Gillespie v. City of Newburgh*, 54 *Ib.*, 468. The mere fact, that the plaintiff's intestate was at the place where he met his death obeying the orders of the defendant is not of itself contributory negligence ; *Doyle v. Baird*, 6 *N. Y. Supp.*, 517, and the question presented being one of care upon his part, the case should have gone to the jury. *Weber v. N. Y. C. & H. R. R. Co.*, 58 *N. Y.*, 451. It is only where it clearly appears from all the circumstances, or is proved by uncontroverted evidence, that the plaintiff has by his own acts or neglect contributed to the injury, that the court can take the case from the jury, and nonsuit the plaintiff ; *Massoth v. Canal Co.*, 64 *N. Y.*, 529 ; *Weber v. R. R.*, *supra*, and a nonsuit should never be granted, where any possible inference can be drawn from the testimony which would relieve the plaintiff from the charge of contributory negligence. *Stackus v. N. Y. C. & H. R. R. Co.*, 79 *N. Y.*, 464. In the application of these principles to the facts of the present case, it appears that the ruling of the Court of Appeals, in the recent case of *McGovern v. The Central Vermont & H. Railroad Company* referred to above, is conclusive to the rights of the plaintiff upon this appeal. The principles enunciated in the case of *Cordell v. New York Central River Railroad Company*, 75 *N. Y.*, 330, do not apply to the present case, because in the case at bar there was no testimony in defendant's

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Appellant's points.

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behalf negating the plaintiff's proof, and there is nothing left to speculation. Whatever, therefore, may be said of the strength of the plaintiff's proof, it is certain that there was enough to warrant the conclusion that the accident was occasioned, either through the negligence of the defendant alone, or through the negligence of the plaintiff and the defendant jointly, in which case the rule is well settled that the master is liable. *Anthony v. Lesset*, 105 *N. Y.*, 591. And where it has been shown that the injury might have been attributed to two causes, *i. e.*, the danger of the place and neglect of fellow-servant, the case should always be submitted to the jury. *Cullen v. Norton*, 5 *N. Y. Supp.*, 523.

IV. The learned trial judge erred in finding that there was "no proof of defective construction of the building," and in refusing to send the case to the jury on that account. The plaintiff's proof was direct, that the beams intended to support the floors were of a capacity of 75 pounds to the square foot with a sustaining capacity of 225 pounds; that prior to and just before the accident the defendant had accumulated some 12,000 or 13,000 bricks upon the fourth floor, besides a suitable supply of mortar to be used in laying them, upon a scaffold seven or eight planks square. Assuming that these planks were of the full length, and one foot wide, we have a scaffold of 8 x 12 feet, upon which all this material was not only allowed, but directed to be accumulated, and calculating its weight at the smallest amount (12,000 bricks) stated in the evidence (the weight of each brick being four pound), and not taking into consideration the mortar at all, it will be seen that upon the 96 square feet of scaffolding provided by the defendants, for holding this material, there was the exorbitant weight 48,000 pounds, or 500 pounds to the square foot of surface, or over twice as much as there ought to have been. And further, that this enormous

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Appellant's points.

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amount of heavy building material was placed there by direction of the defendant, through his foreman, because he had determined to dispense with the use of the elevator after that day, and wanted to get all the material up before it was taken away. Upon this testimony and upon a personal examination of the premises, after the accident made before any of the débris had been removed, Mr. Thomas J. Brady, Superintendent of Buildings for the city of New York, a man who had had an experience of twenty odd years in the building trade, testified as an expert, positively, that the cause of the accident was "piling material on the floors—overloading them." Whether, therefore, the defendant had been technically guilty of a breach of a positive statute in erecting the building in the manner in which it was done, is of no consequence, since in whatever manner the work was done, he owed a duty to the plaintiff's intestate, with which he failed to comply, when he directed the floors to be overloaded, and saw that it was done.

V. The death having been caused, as the evidence shows, by a neglect of duty, on the part of the defendant, the question of intent could have had no effect upon his liability; hence the court erred in dismissing the complaint upon the ground that there was no evidence of intentional overloading by the defendant.

VI. It is no defence to this action that the injury complained of occurred in the course and conduct of the business in which the plaintiff's intestate was employed (*Booth v. Boston & Albany R. R. Co.*, 73 *N. Y.*, 38), nor that the injury occurred through the negligence of his fellow employes; and it was error to dismiss the complaint on these grounds. *Courtney v. Cornell*, 49 *N. Y.*, *Super. Ct.*, 286; *Pantzer v. Tilly Foster Iron Co.*, 99 *N. Y.*, 369. This is so, because the master is only relieved of his liability to his servants from the result of injuries occurring in the course of business, where the defects complained of are apparent. *De Forrest v.*

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Appellant's points.

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Jewett, 23 *N. Y.*, 264 ; Davidson v. Cornell, 10 *N. Y. Supp.*, 521. And the master, owing a duty to the servant to furnish him safe and adequate instrumentalities for the performance of the work assigned, cannot escape liability in a case where the action is based upon a breach of duty in this respect, on the ground that the negligence complained of was that of a fellow-servant. Cone v. Railroad Co., 81 *N. Y.*, 206. The rule is general, that where one enters the service of another, he takes upon himself the ordinary risks of the employment, but it has its exceptions, and is, therefore, not of universal application. Thus, while he assumes all the ordinary risks incident to the employment, he does not take upon himself the hazard of extraordinary risks, which are added by the failure of the employer to perform the duty enjoined upon him by law. Rogers v. Lyden, 137 *Ind.*, 50.

VII. Three things, says this court, must be proved in order to entitle plaintiff to recover in an action of this character, viz.: (1) that the machinery or appliance was defective; (2) that the master had knowledge or notice of the defect; (3) that the servant did not know, and had not equal means of knowledge with the master. Reordan v. Com. Card Co., 51 *N. Y. Super. Ct.*, 134. It is respectfully submitted that this case falls within the principles of the rule thus laid down, because the fact is that the floor supporting the scaffold where the deceased was at work was defective, in that it was not built to sustain the weight put upon it by direction of the defendant, who knew or ought to have known that it was being overloaded. Such being the case, the defendant cannot shield himself from liability by claiming that his attention was not particularly called to its imperfect condition; it was his duty to know the condition of the place where he put his employes to work, and he was guilty of want of care in failing to discover it. Klupp v. Ice Co., 15 *N. Y. Supp.*, 597. So, in an

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action for the death of an employe, caused by a defective appliance furnished by the employer, if the defect was one of construction, it is not necessary to allege the employer's knowledge of it. *C. & E. I. R. R. Co. v. Heins*, 33 *Ill. App.*, 271. The relation of the defendant to the plaintiff's intestate establishes the fact that he did not know and had not equal means of knowing of the defect complained of with the master. He was a common laborer—blindly directed to do certain manual service—while the defendant was the builder of the house in question, familiar with its plans, and knew or ought to have known the capacity of the floors to sustain a given amount of material; and it was his duty to have directed its construction and the labor of the deceased, so that no harm should have come to him, in the manner and under the circumstances of this case.

VIII. In conclusion, the contention is made, that the courts of this state have in numerous instances held that where the master employs servants in the building of houses and other structures, it is his duty to furnish safe and proper scaffoldings and supports, for the use of the servants. *Green v. Bants*, 48 *N. Y. Super. Ct.*, 156; *Pantzer v. Tilly Foster Iron Co.*, 99 *N. Y.*, 368; *Davidson v. Cornell*, 10 *N. Y. Supp.*, 811. And the overloading of a floor is negligence for which the master is responsible (*Dillion v. 6th Ave. R. R.*, 48 *N. Y. Super. Ct.*, 283) to a servant injured thereby. *Metzgar v. Herman*, 12 *Week. Dig.*, 182; see also, *Marsh v. Chickering*, 101 *N. Y.*, 400; *Probst v. Delamater*, 100 *Ib.*, 266; *Banizing v. Steinway*, 101 *Ib.*, 522.

*Edgar Whitlock*, attorney and of counsel, for respondent, argued:—

The court granted the motion of the defendant to dismiss the complaint, and denied the motion of the plaintiff that the case be submitted to the jury, to both of which rulings plaintiff excepted, and on these excep-

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tions the appeal mainly rests. It is not here intended to discuss the propositions of law laid down by the court below (because they are believed to be elementary in character), but to proceed at once to a consideration of the evidence to sustain the conclusions of the learned justice as set forth in his opinion. While the plaintiff's intestate was working on the fourth or fifth floor of the building in question, the floor gave way and, with the matter upon it, fell upon the floor beneath, and carried it and all the other floors down to the cellar. The deceased fell with the floors and was thereby killed. There was no direct evidence as to the cause of the floor giving way. The theory of plaintiff's case (as developed by the testimony) was that the giving way was caused by overloading. It appears that there was no defect in the building itself; "the building was in first-class condition; the walls were in first-class condition prior to the accident; all the conditions of the permit issued by the building department had been complied with to the letter." Assuming that overloading was the cause of the accident, it still remains to be established: (1) That the overloading occurred because of defendant's negligence; and (2) That the deceased did not by his own negligence contribute thereto. To the testimony of the witness McKeon alone must we look for evidence on these points. His story, in brief, is as follows: The deceased (Flynn), with the witness McKeon, and Dunkin and Hart, were working in the defendant's employ at the time of the accident on the fourth or fifth floor unloading the elevator of the brick and mortar it was bringing up, which they dumped on the floor. They were taking the stuff off the elevator when the defendant came around and ordered them to stop the machine, saying they had got enough stuff on that floor. They took the stuff off the machine, and the elevator went down, and just after they emptied their hods the floor went down, and that was the last the witness knew. There

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is no question here as to whether or not the deceased was supplied with proper tools, or implements, or whether machinery was safe or sound; nor whether there was any defect in the building or at the place where the deceased was required to be, but simply and solely whether, by order of the defendant or those for whose acts he is liable, a load was imposed on the floor such as it was not intended to bear, and, if so, whether such order is to be classed as a mistake in judgment for which defendant is not liable, or as so gross an oversight of existing and well ascertainable facts as to constitute negligence. It nowhere appears under what orders the deceased and his colleagues were working, nor are any facts stated from which an inference can be drawn, unless from the statement of the foreman that he wanted to get enough stuff on every floor to raise the front a story higher. They had received no orders from defendant personally as to how much stuff was to be carried up. They seemed to have been left to their own judgment, and they only stopped when the defendant came around and ordered them to stop, and they were obeying this order when the floor fell. There is, therefore, no evidence to show that they were acting under either of the classes of orders above referred to. There is no question of a concealed or hidden danger involved, nor one where the master had opportunities of knowledge not open to the servants. On the contrary, the servants alone appear to have been on the particular spot; they and they only were doing the work; they had the best opportunity for knowing how much was being unloaded, and consequently for knowing when the danger limit was reached. The matter was entirely in their own hands. They might at any moment have stopped, saying, "It is not safe to load any more material on this floor," and to have done so without in any way causing the master annoyance or displeasure. Clearly, they (of whom the deceased was one) "by their conduct at least

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contributed in bringing about the result. The overloading was done by them and no one else. They do not appear to have been dominated, directed or controlled by the defendant."

BY THE COURT.—GILDERSLEEVE, J.—On or about the 25th day of August, 1888, the defendant, as contractor and builder, was erecting and superintending the construction of a house on premises in West 83d street, in this city; and plaintiff's intestate, Charles Flynn, was employed by the defendant, as a day laborer, on this building. The particular service in which the deceased was engaged, at the time of the accident hereinafter referred to, on the day aforesaid, was the removing of brick and mortar, contained in hods, from an elevator machine, which carried the materials from the ground up to the several floors above. At the time of the accident by which plaintiff's intestate met his death, he was at work on the fourth floor in taking the hods from the elevator and dumping the contents upon a scaffold near the elevator, for use in building the front walls of the house. While said intestate was so employed, the floor beams gave way, and precipitated the materials that had been deposited near the elevator, as aforesaid, upon the floor beneath, and carried it and all the other floors below, with their contents, down to the cellar. The deceased fell with the floors, and was thereby killed. This action was brought to recover damages for the death of the plaintiff's said intestate, on the ground of the defendant's negligence and want of care and skill in the construction of said building, and in carelessly overloading the beams and girders of said building with mortar, brick and other building materials. When plaintiff rested, the court below dismissed the complaint on the ground that there was no evidence of any negligence on the part of the defendant, but that whatever negligence there was attached to the plaintiff's intestate and his fellow-workmen.

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The dismissal of the complaint having been made upon the defendant's motion after the close of plaintiff's case, without any testimony whatever on defendant's behalf, the evidence contained in the record must be taken as true for the purposes of this appeal, and the appellant is entitled to have every doubtful fact found in her favor. *Coldgrove v. N. Y. & N. H. R. R. Co.*, 20 *N. Y.*, 494; *Wylie v. Marine National Bank*, 61 *Id.*, 417.

The testimony shows that the defendant was present and supervised the work, at the time of the accident. The only inference to be drawn from the evidence as to the cause of the accident, is that it was occasioned by overloading the fourth story with brick and mortar, which were brought up from the ground in the machine above referred to, under orders from defendant or his foreman and agent, with the knowledge of defendant. It does not appear that the quantity of material to be placed on the fourth floor, or the other floors, was in the discretion of the laborers, of whom the intestate was one, and therefore that the overloading was an error of judgment on the part of said laborers. The intestate, with his immediate co-workmen, was on the fourth floor at the time of the accident, and these men were charged with the duty of taking from the elevator, at that point, such materials as were sent up in the hods, presumably by direction of the defendant or his foreman. The defendant and his foreman must be presumed to have known the quantity of brick and mortar necessary to complete the work. The evidence warrants such a finding of fact. McKeon, a fellow-workman with intestate, swore that the defendant's foreman told them (the laborers) "that was the last day to run the machine, and that he wanted to get enough stuff on every floor to finish the front, so as to raise it a story higher; and that the machine would only run that day, and that there would not be a day's work for the machine." McKeon further testifies that just before the accident, the defendant came around and

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said, "Boys, you have got enough stuff on this floor—enough to finish the building—just stop the machine." The intestate and the other laborers on the fourth floor, where the defendant gave these instructions, took the materials off the machine; the elevator returned to the ground floor, and, just after these laborers had emptied their hods, the floor went down, carrying the intestate with it to his death. This state of facts did not justify the conclusion of the learned trial judge that, although an injury resulting from the overloading of a building might create a liability, the right to recover could not belong to plaintiff, for the reason that the intestate was one of the overloaders and a *particeps criminis*. It was not to the want of judgment on the part of the men, of whom intestate was one, that the accident was due. If the accident was the result of such a want of judgment, plaintiff has no cause of action, since it is elementary law that a master is not liable for the errors, mistakes, want of judgment or negligence of fellow-workmen. The intestate appears to have been free from contributory negligence; he, with his fellow-workmen, was obeying the orders of the defendant, or his agent; the defendant was present, and saw the work going on. The affirmative proof indicates clearly that the intestate and his fellow-workmen did not bring the misfortune upon themselves by their indiscretion. True, they did the work; but it was done by the direction and under the superintendence of the defendant, by whom it appears they were dominated and controlled. The intestate was merely carrying out the directions of the defendant. There was no outward indication of the impending danger to warn the intestate of the peril that was before him, that called upon him for any effort to escape therefrom. Had he insisted upon leaving the floor, or refused to obey the orders of his superiors and continued the unloading of the machine, as he had been directed to do, he would have been guilty of disobedience that

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would, perhaps, have warranted the defendant in discharging him. The work upon which the intestate was engaged was not what is known as extra-hazardous in its nature, calling for the exercise on the part of the intestate of more than ordinary prudence and care. It was manifestly an accident such as in the ordinary course of things does not happen, if those who have the management use proper care. The danger, as we shall subsequently show, was one of which the master had opportunities of knowledge not possessed by the laborers in his employ. From a careful analysis of all the evidence, it affirmatively appears that the intestate did not contribute in any degree to the accident that resulted in his death.

This question remains to be discussed, namely : Was there sufficient evidence of negligence on the part of the defendant to entitle the plaintiff to have the case submitted to the jury ? It is incontestable that the accident was caused by piling too much material on the floors, and especially upon the fourth floor, where the beams or floor timbers first gave way. There is no question here of a failure on the part of the defendant to supply proper tools or implements, nor any question as to whether the machinery was safe or sound ; nor whether there was any defect in the building. The inspector of buildings testified that he examined the building the day before the accident, "that the building was in first-class condition—the walls were in first-class condition—all the conditions of the permit, issued by the building department, had been complied with to the letter ;" and that the accident was due to overloading the floors. The question the defendant had to meet was this : Was there placed upon the fourth floor, by order of defendant, or his foreman, a weight of materials in excess of the weight the floor was intended to, or could reasonably be expected to bear ? If so, was such order a mistake in judgment, for which defendant is not liable, or a

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gross oversight of existing and well ascertainable facts that constitute negligence? To put it more tersely, was the use of the premises by defendant so unreasonable as to evince negligence? If there was any evidence to sustain this proposition, and we are correct in holding, as we have already done, that the intestate was free from contributory negligence, it was the duty of the learned trial judge to submit the case to the jury. A master owes the duty to his servant of furnishing a safe and proper place in which to prosecute his work, and, when they are needed, the employment of skillful and competent workmen to direct his labor and assist in the performance of his work. This duty cannot be delegated by a master to a servant of any grade so as to exonerate the master from responsibility to another servant who has been injured by its non-performance. *Pantzar v. The Tilly Foster Iron Mining Co.*, 99 *N. Y.*, 368.

Due care had been taken by defendant, as appears from the evidence, in the construction of the building, and there is no evidence of any hidden and internal defect therein that was the cause of the collapse of the building and the resulting injury; but the evidence, uncontradicted, warrants the conclusion that there was an overloading of the floors, by order of defendant, which was wrongful in a legal sense, and which amounts to a specific act of negligence in the use thereof. The defendant was entitled to use the floors and employ his servants upon and about the same by imposing upon said floors quantities of materials of such weight as the strength of the floor timbers could reasonably sustain. Within the limits of such reasonable use, the only limit was the capacity of the floors and the building. It might be assumed that the defendant, being an experienced builder and an intelligent man, had specific knowledge of the strength of the floor timbers he used, and approximately of the strength of the building generally. This, however, is not necessary. The evidence indicates

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*how* the defendant knew the capacity of the floor timbers. The superintendent of buildings swears that "the floor beams, where the materials were, were calculated for strength to carry the weight of the floor, so that when you reached an average of 225 pounds to the square foot of weight placed upon that floor, then you would reach what we term a breaking point—each floor was constructed for 75 pounds to the square foot, with a factor of safety of 3." It further appears from the evidence that just before the accident, by the personal orders of defendant, or his foreman, there had been accumulated some twelve or thirteen thousand bricks upon the fourth floor, besides a suitable supply of mortar to be used in laying them, upon a scaffold 7 or 8 planks square. The plaintiff should have shown the exact or proximate size of these planks; but, assuming that they were planks of the size ordinarily used for the purpose to which these were subjected, we have a scaffold or floor space of about 8 by 12 feet, upon which all this material had been accumulated. It was testified that each brick weighed about 4 pounds; and if we leave out of consideration the mortar, which was evidently no small factor in weight, we find that the floor space in question was subjected to a weight of about 500 pounds to the square foot of surface—more than twice the weight that the superintendent of buildings testified would bring the strain up to a breaking point. This was, clearly, such an oversight on the part of the defendant, who was present and directed and saw the condition of affairs, of existing and well ascertainable facts as to constitute negligence. The defendant was not warranted in ascertaining the full capacity of the floor as to strength by actual use in piling materials thereon. He must be presumed to have had a fair and reasonable knowledge of the business in which he was engaged, which includes a knowledge of at least the approximate strength of the floor timbers he had placed

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in the building, and a knowledge of the approximate weight of twelve or thirteen thousand bricks and a quantity of mortar that he had accumulated upon that floor.

The case at bar is not analogous to *Dillon v. Sixth Avenue R. R. Co.*, 48 *N. Y. Super Ct.*, 283, where an injury resulted from the giving way of a floor that had been overloaded, and in which case the general term of this court held "that the defendant was justified in ascertaining the capacity of the floor and building as best he could by actual use in the course of his business."

While we rest our decision upon the grounds above set forth, we may add that the case under consideration is not unlike the case of *Green v. Banta*, 48 *N. Y. Super Ct.*, 156. In that case, the plaintiff and other servants of the defendant were dumping bricks upon a scaffold when it fell, and plaintiff was injured thereby. The general term of this court held, in that case, "that it was the duty of defendant to furnish for plaintiff to work upon properly built scaffolding, and any negligence of the foreman or other workmen, employed by defendant, to erect the same was defendant's negligence, and not that of a fellow-workman of plaintiff." It also held "that the fact that the scaffold gave way was *prima facie* evidence of negligence."

For the reasons above indicated, we are of opinion that it was the duty of the learned trial judge to submit the case to the jury.

The judgment appealed from is reversed, and a new trial granted, with costs to abide the event.

FREEDMAN, P. J., and DUGRO, J., concurred.

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Statement of the Case.

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CATHARINE S. HUNTER, RESPONDENT v. THE  
MANHATTAN RAILWAY COMPANY, ET AL.,  
APPELLANTS.

*Practice—Marking requests to find pursuant to section 1023 of the Code of Civil Procedure—When general endorsement at foot of findings sufficient.*

The action was for an injunction and incidental damages against defendants' elevated railroad. The trial court failed to note its disposition of the proposed findings of fact and conclusions of law in the margin opposite each proposition as required by section 1023 of the Code of Civil Procedure, but endorsed upon the proposed findings and conclusions the following ruling: "Each of the within requests is to be marked 'Refused,' except so far as covered by the findings of fact and conclusions of law settled and signed by me." *Held*, that while this mode of passing upon defendants' propositions was not in strict compliance with the provisions of section 1023 of the Code of Civil Procedure, the court did indicate the manner in which each proposition had been disposed of and hence complied substantially with the statute. The question, however, is not properly presented by the record to the general term. The better practice would have been to apply to the court below to have the omission complained of supplied, or the mistake, if one, corrected, and, in case of refusal, to have made the application and refusal a part of the record.

Before DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

Appeal by defendants from a judgment entered upon the decision of a judge rendered after trial at special term. The facts are sufficiently stated in the opinion.

*Davies & Rapallo*, attorneys, and *R. L. Maynard* of counsel, for appellants.

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Opinion of the Court, by GILDERSLEEVE, J.

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*Ira O. Miller*, attorney, and *David B. Ogden* of counsel, for respondent.

BY THE COURT.—GILDERSLEEVE, J.—The judgment directs that the plaintiff recover of the defendants the sum of \$12,556.25, damages and interest, and \$941.23, costs and extra allowance. It also restrains defendants from maintaining or using their elevated railway in front of plaintiff's premises, unless the defendants shall, within the time and in the manner specified therein, pay to the plaintiff the sum of \$12,000, with interest from the date of this judgment, in exchange for a conveyance and release of the property appropriated by the defendants.

A fair preponderance of evidence sustains the findings of the court below, and justifies the judgment. There are no exceptions to the admission or exclusion of evidence that are of sufficient importance to require discussion.

The omission of the court below to comply strictly with the letter of section 1023 of the Code of Civil Procedure would not warrant a reversal of this judgment. It will not be denied that if the court below disregarded defendants' requests and made no response to any of them, it neglected its duty; and if the error prejudiced the appellants, the judgment should be reversed (*Matter of Hicks*, 14 *State Rep.*, 323); but if such neglect is not prejudicial to the appellants, it is not ground for reversal. *Uhlenhaut v. Manh. Ry. Co.*, 18 *N. Y. Supp.*, 797.

Section 1023 of the Code provides that "at or before the time when the decision or report is rendered, the court or referee must note in the margin of the statement the manner in which each proposition has been disposed of," etc. The court below endorsed upon the defendants' proposed findings of fact and conclusions of law the following ruling: "Each of the within requests is to be marked 'Refused,' except so far as

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covered by the findings of facts and conclusions of law settled and signed by me." This is not a strict compliance with the requirements of section 1023 of the Code, inasmuch as this ruling was endorsed upon the proposed findings, instead of being noted in the margin of the statement, as required by the statute. The action of the court below did, however, indicate "the manner in which each proposition has been disposed of," but did not note it "in the margin of the statement." Hence, although it is not an absolute compliance with the terms of the statute, it is a substantial compliance (*Livingston v. Manh. Ry. Co.*, 17 *N. Y. Supp.*, 486); for the purpose of the section is, doubtless, to require the court or referee to pass upon each request, and indicate the manner in which it has been disposed of. In the case at bar, each and all of defendants' requests were refused, except so far as they had been covered by the findings settled and signed by the court. This disposes of the requests substantially in accordance with the purpose of the section referred to.

In the case of *Livingston v. Manh. Ry. Co.*, *supra*, the general term of this court held that, "While, therefore, it may be technically the duty of a judge or referee to pass upon such requests, that duty will be fully performed by a specific denial of each and every one of them demanding a fact to be found which either is immaterial or has already been substantially covered by the findings embodied in the decision or report." And in the case of *McCulloch v. Dobson*, 30 *N. E. Rep.*, 641, the Court of Appeals held that the omission of a referee to indicate upon the margin of the paper or otherwise his disposition of certain propositions of fact and law submitted to him, under section 1023 of the Code, is not ground for reversal, where "the propositions were nearly all either covered by the findings made by the referee, and stated in his report, or they were immaterial."

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Statement of the Case.

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In any view, we do not think the grounds here urged for reversal are properly before the general term. The better practice in such a case would have been to apply to the court below to have the omission supplied or mistake, if one, corrected, and, in the event of the request being refused, to have made the application and refusal a part of the record. Such a course would have enabled the court below to supply an omission that might have been the result of oversight or mistake, and would have secured the presentation of a record prepared in accordance with the views of the trial judge. *McCulloch v. Dobson, supra.*

We are of opinion that the judgment appealed from should be affirmed, with costs.

DUGRO J., concurred.

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JONATHAN D. CONDUCT, RESPONDENT v. JANE H.  
COWDREY, APPELLANT.

*Real estate broker, commissions of, when earned.*

Upon a former trial of this action the court held, that two papers introduced in evidence, one a receipt and the other a deposit *in escrow*, established a contract for the sale of the Kentucky lands from defendant to Wolfe and Millikin, and that all prior negotiations merged in these two papers, and directed a judgment in favor of plaintiff, awarding him his commissions. The defendant insisted, upon that trial, "that there was an unexpressed condition upon which the writings were delivered," and asked to prove that condition, and so established what defendant claimed was the whole and complete contract between the parties. This parol evidence offered was rejected by the court on the ground that the writings named were conclusive. When the case reached the Court of Appeals, that court held that this ruling rejecting the parol evidence was erroneous, and for the error reversed the judgment. The Court of Appeals also held that there arose a question of fact for the jury which should

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have been submitted under proper instructions. Upon the new trial the evidence that had been rejected upon the former trial was admitted, and upon the question of fact that it raised, the jury found adversely to defendant upon sufficient evidence.

*Held*, that whether the transaction was or was not a sale, was upon all the evidence a question for the jury, as was also the question of plaintiff's instrumentality in bringing it about, and the jury having found these facts in favor of the plaintiff, he became, in law, entitled to his commissions.

Before DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

Appeal from judgment entered upon the verdict of a jury, and from an order denying defendant's motion for a new trial.

*William M. Ivins*, attorney, and *W. W. MacFarland* of counsel, for appellant, argued:—

I. What the contract was. In order to ascertain what the contract was, it is necessary to go somewhat beyond the writing signed by the defendant, and consider what took place between the parties previously. The negotiation concerning the matter in question which took place before the writing was signed was between the plaintiff and Samuel R. Dickson, the attorney in fact of the defendant. The plaintiff testified, in substance, that he met Mr. Dickson in January, 1887 (the writing bears date May 10, 1887). He had a conversation with Mr. Dickson concerning the sale of the land; he says, "he authorized me to go ahead and sell the lands; the price asked was ten cents an acre; he agreed to pay me a commission of ten per cent." On the 10th of May, 1887, an agreement in writing between the defendant and Jere Baxter was executed, by which an option to purchase was given to the latter. The plaintiff then suggested to Dickson that he would like to have the

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Appellant's points.

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arrangement between them confirmed by the defendant in writing. Dickson said : " You draw it up and I will take it to her." Thereupon the plaintiff prepared the writing in question. Dickson says that the agreement made and intended to be expressed was that the plaintiff was to receive as his commission 10 per cent. of what the defendant accepted, realized and received, but it may be conceded for the purposes of the case that the terms of the memorandum express fully the agreement ; nothing turns upon the slight variation for it is admitted that if an actual sale of the lands unconditional and complete had been made the plaintiff would have been entitled to commissions though the sale was on credit and payment never realized. It is assumed, then, that the whole contract is contained in the writing prepared by the plaintiff himself and signed by the defendant. In that writing defendant says : " I hereby agree to pay you a commission of ten per cent. on the price I may accept for the land if sold through your agency. I acknowledge your agency in bringing Jere Baxter and his associates to me, whereby a refusal until September 10th next was given by me." This was the whole of the contract, according to the plaintiff's own contention, and, in construing it, it is important to bear in mind that the words are his own. No commission is payable under this contract unless the land is sold ; there must be an actual sale ; an executory contract for sale never carried out is plainly not sufficient. The complaint assumes such to be the true construction, and alleges an actual sale. The opinion of the Court of Appeals proceeds upon the same interpretation. When the broker himself does not effect a sale, but merely brings parties together, his right to commissions is wholly contingent upon the result of their negotiation, over which, however, he can exercise no control, and to which he is in no sense a party (Opinion Court of Appeals, 123 N. Y., 469). If parties enter into an executory contract of

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sale, commissions are not earned and payable at that stage of the affair. If for any reason the contract never results in a completed sale, no commissions are earned, for the parties, so far as the broker is concerned, are at liberty to do as they please in the premises, and the broker is only concerned in the ultimate result. They may, for example, agree to abrogate the executory contract without giving him any cause of complaint. *Sibbald v. Bethlehem Iron Co.*, 83 *N. Y.*, 388. *Fraser v. Wyckoff*, 63 *Ib.*, 445. 1 *Parsons on Contr.*, 7 ed., p. 109, and notes. The court takes judicial notice of real estate brokers, their customs and usages. *Eaton, Cole & Burnham Co. v. Avery*, 83 *N. Y.*, 31. The precise question, therefore, is whether upon the evidence there was an actual sale of the property or merely an executory contract for sale never carried out. In the discussion of this question it will be assumed that the contracting parties were brought together by the plaintiff, so that he would have been entitled to commissions if an actual sale had followed.

II. The land was not sold. It is obvious that no sale was consummated unless we are able to find a contract, the non-performance of which, by the one party or the other, would give rise to an action for specific performance or damages, as the case might be. There was not a completed sale on credit; the title remained in the grantor; the grantees might carry out the contract for sale or not, at their pleasure, under pain of a stipulated forfeiture, or, for just cause, if the abstract proved to be inaccurate. The executory agreement for purchase never was carried out; that is proved and not disputed. It should be observed here that the plaintiff is not concerned with the reasons why the sale fell through; it is the fact that it was not completed that affects him. The writings distinctly inform us that there was a collateral understanding of some kind between the defendant and Millikin and Wolffe, and the Court of Appeals has de-

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Appellant's points.

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cided that parol evidence is admissible to prove what it was, and so ascertain the meaning and intention of the parties as to the consummation of the transaction. It has also been decided that when all the evidence is in, the plaintiff's right to recover will depend upon whether or not it shows an actual sale of the property, and that he is not entitled to recover if the obligation to pay the drafts and take the title was in fact conditional. The proof that it was so is clear and undisputed, and therefore the case stands upon no controverted facts, no conflict of evidence, and presents only a question of law arising upon the construction of established facts. The abstract of title was to be verified, for nothing but quit-claim deeds were to be given by defendant, and it was the understanding that unless the abstract was found to be correct on examination the agreement for sale was to be abrogated. It was conclusively established as a fact and by the plaintiff's own evidence that there was no actual and completed sale of the property, but only an executory contract of sale. There was no controverted question of fact to go to the jury, and the case presented when the evidence was in only a question of law for the court. On this point the Court of Appeals decided only that the writings were open to explanation by parol evidence, not that the case must go to the jury whether there was any conflict of evidence or not. As it turned out, there was no question of fact to be submitted to the jury, but only a question of the legal construction of certain papers taken in connection with certain undisputed collateral facts.

III. No commissions were earned by the plaintiff. But little remains to be said on this point. The conclusion is one of law, to be drawn from facts proved and wholly undisputed. The Court of Appeals has decided (*a*) that the writings in question were somewhat ambiguous; (*b*) that on the face of the writings there was a strong indication that the transaction did not

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Respondent's points.

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amount to a completed sale, and that there were unexpressed conditions (123 *N. Y.*, 46, 47); (c) that if there were, it was allowable to prove by parol evidence what they were; (d) that if such should prove to be the case and the sale fell through there could be no recovery. It is now established beyond dispute that such was the case, for there was simply a failure to carry out an executory arrangement. Finally, it is submitted, that as a conclusion of law, from evidence wholly uncontradicted and undisputed, the lands were not sold, within the meaning of the agreement with the plaintiff for commissions; that the motion for a nonsuit should have been granted, and that there should be a new trial.

*Cannon & Atwater*, attorneys, and *Henry G. Atwater* of counsel, for respondent, argued:—

I. The evidence is sufficient to justify the verdict. It will not, of course, be contended that there was not evidence on the trial which might have justified the jury in rendering a verdict for the defendant, but taking the evidence in the plaintiff's favor and giving to it such construction as the jury were justified in placing upon it, there seems no difficulty in sustaining the verdict.

II. The real gist of the transaction was this: The defendant had for sale a certain alleged title which was stated in a certain abstract, and this title she employed the plaintiff to sell. The plaintiff by his exertions made a sale of it to Wolffe and Millikin, who afterward refused to complete their purchase because the defendant could not deliver to them the title which she had agreed to sell them. That the plaintiff by his exertions procured to be made whatever contract was made is plain enough. No one can read his evidence without seeing that the verdict upon this point is beyond any doubt. The defendant's contention is that the defendant did not claim to have any title to these lands, or at least not any particular title or chain of title, and that all she agreed to

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Respondent's points.

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sell was such title as it might be discovered she had, and that Wolffe and Millikin were not obliged to buy unless upon examination they found her title was satisfactory to them. This, however, is contradicted, not only by all other facts in the case, but also especially by the fact that the defendant having been sued by Wolffe and Millikin to get back the cash and acceptances on the ground of the misrepresentation as to title, returned the acceptances and made arrangements to pay back the cash. This is entirely sufficient to refute any claim that they could still retain the cash as damages for breach of contract, even if they did not have the title set out in the abstract. The jury upon all this evidence were justified in finding that what Condict was employed to sell was a title such as was set up in the abstract furnished by the defendant; and that Condict in fact did find a purchaser who was willing to buy that title at the price named. The jury having so found, the plaintiff became in law entitled to his commissions. Where a broker employed to effect a sale has found a purchaser willing to take upon the terms named and of sufficient responsibility, he has performed his contract and is entitled to the commissions agreed upon. *Duclos v. Cunningham*, 102 *N. Y.*, 678; *Lloyd v. Matthews*, 51 *Ib.*, 124; *Mooney v. Elder*, 56 *Ib.*, 240; *Sibbald v. Bethlehem Iron Co.*, 83 *Ib.*, 378, 382, 384. The broker is entitled to his commissions although the purchaser refuses to take the property on account of an alleged defect of title. *Knapp v. Wallace*, 41 *N. Y.*, 477. Or on account of alleged misrepresentations made by the seller in regard to the property. *Glentworth v. Luther*, 21 *Barb.*, 145; *Holly v. Gosling*, 3 *E. D. Smith*, 262. In this case the uncontradicted evidence showed that the plaintiff had found a purchaser able and willing to buy on the terms named. Upon these facts he was entitled to his commission.

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Opinion of the Court, by GILDERSLEEVE, J.

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BY THE COURT.—GILDERSLEEVE, J.—This action is brought by plaintiff to recover from defendant commissions alleged to have been earned under a certain agreement between himself and the defendant, relating to the sale of lands. The plaintiff is a real estate broker ; and, in January, 1887, was introduced to one Samuel A. Dickson, who, at that time, was agent and attorney in fact of defendant, and represented her in relation to all matters connected with the Kentucky lands, which the plaintiff was employed to sell. At this interview, Mr. Dickson gave Mr. Condict a list of the lands, showing the lands in each county and the original sources of title. Mr. Condict soon succeeded in interesting in the matter one Jere Baxter, with whom was associated one W. A. Millikin ; and the defendant gave Baxter an option on the land to September 10th at ten cents an acre ; which option was subsequently extended. About this time, the plaintiff asked for an agreement in writing from defendant, and thereupon defendant gave plaintiff a written agreement in the following terms : “To Jonathan D. Condict, Esq., 145 Broadway, New York. Sir : I hereby agree to pay you a commission of ten per cent. on the price I may accept for the 435,000 acres of land in Eastern Kentucky, belonging to me, if sold through your agency. I hereby acknowledge your agency in bringing Jere Baxter and his associates to me, whereby a refusal until September 10th was given by me. Jane H. Cowdrey.”

It was claimed, in behalf of defendant, upon the trial, that plaintiff was not the moving party in the transactions that took place between the defendant and others, which, plaintiff claimed, were the consummation showing that he had earned his commission. There was some conflict of evidence as to whether Millikin, as well as Baxter, was first introduced to Dickson by plaintiff. On this question the jury, as indicated by their verdict, found in favor of plaintiff's contention ; the evidence

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Opinion of the Court, by GILDERSLEEVE, J.

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justifies their finding and is conclusive upon this question.

The employment of the plaintiff by defendant not being disputed, and assuming that whatever contract was made with Wolffe and Millikin came through the plaintiff's instrumentality, this question remains: Was the latter contract such a one as constituted a fulfillment of plaintiff's contract with defendant, and entitled plaintiff to his commissions? The written evidence of the contract with Wolffe and Millikin, in reference to the Kentucky lands, consists of two papers; one a receipt, and the other an agreement for a deposit *in escrow*. Upon a previous trial of this action, the court held that all prior negotiations were merged in these two papers; that they established a contract for the sale and purchase of the Kentucky lands, and directed a judgment in favor of the plaintiff, awarding him his commissions. When the case reached the Court of Appeals, that court held (123 N. Y., 463), as follows: "If that construction was correct, the judgment awarded was an inevitable result; but the defendant claims that the writings showed merely an option or privilege, for which the alleged vendees paid the sum of two thousand dollars, and which left them at liberty to purchase or to refuse to purchase, at their own choice and pleasure, and so the minds of the parties never met, and the broker's efforts to effect the sale failed of success." The learned appellate court was in doubt as to what construction should be given these two papers, read together, in the light of such surrounding facts and circumstances as were proved; but it did not hold that the construction given by the learned trial judge was erroneous.

Upon the first trial, the defendant insisted "that there was an unexpressed condition upon which the writings were delivered," asked to prove that fact, and so establish what she claimed was the whole and complete con-

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Opinion of the Court, by GILDERSLEEVE, J.

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tract. In truth, the defendant did introduce parol evidence, upon the first trial, tending to establish the "unexpressed condition" she claimed existed; but, upon final consideration, this parol evidence was rejected by the court on the ground that the writings were conclusive. The Court of Appeals held that this ruling was erroneous, and for the error reversed the judgment. The Court of Appeals say that the rejected evidence of Mr. Dickson, the defendant's agent, if true, would show that what appears upon the face of the papers to have been an agreement of sale, is in reality a privilege to purchase at a fixed price, or to refuse to purchase upon the forfeiture of a definite sum; or what seemed to be an agreement of sale, was in truth a mere option to purchase. . . . "In other words, there was no absolute contract of sale, but merely an option." The Court of Appeals further says: "This evidence was contradicted, and so there arose a question of fact for the jury, which should have been submitted to them under proper instructions."

No exceptions were taken to the admission or rejection of evidence in the course of the trial, and no exception was taken to the charge of the learned trial judge. The evidence above mentioned, that had been rejected upon the former trial, was admitted, and upon the question of fact that it raised the jury found adversely to the defendant, upon sufficient evidence.

We are of the opinion that whether the transaction was or was not a sale, was, upon all the evidence, a question for the jury, as was also the question of plaintiff's instrumentality in bringing it about.

The jury having found these facts in favor of the plaintiff, he became in law entitled to his commissions.

Where a broker employed to effect a sale has found a purchaser willing to take upon the terms made, and of sufficient responsibility, he has performed his contract, and is entitled to the commissions agreed upon. Duclos

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*v. Cunningham*, 102 *N. Y.*, 678; *Sibbald v. Bethlehem Iron Co.*, 83 *Ib.*, 378.

We reach the conclusion that the judgment and order should be affirmed, with costs.

DUGRO, J., concurred.

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SOCIETA ITALIANA DI BENEFICENZA, RESPOND-  
ENT v. CATHARINE SULZER, APPELLANT.

*Contract, defence thereto ; defendant must elect either to stand upon her alleged counter-claim and affirm the contract, or to abandon the counter-claim and stand upon the alleged facts.*

*Held*, that defendant could not have the benefits of a valid contract without bearing its burdens. She could not be permitted to affirm in part, and rescind in part. The trial judge properly compelled the defendant to elect either to stand on her alleged counter-claim and affirm the contract, or to abandon the counter-claim and stand upon the alleged facts as a defence. The offered evidence of preparations made by defendant was properly excluded. The only theory on which such evidence might be admissible is that it would show defendant's belief in the representations made. But no representation is available for that purpose unless it is a representation as to an existing material fact, and the representations relied upon for rendering the excluded evidence admissible related to mere expectations and not to existing material facts. If defendant wished to rely upon the representations of expectations which she claimed the plaintiff's committee made to her, she should have exacted a guaranty of the number to be present or a guaranty of profits.

Before FREEDMAN and DUGRO, JJ.

*Decided July 5, 1892.*

Appeal from judgment entered in favor of the plaintiff upon the verdict of a jury, and from an alleged order denying defendant's motion for a new trial.

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Appellant's points.

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The facts and points fully appear in the opinion of the court.

*Lorenz Zeller*, attorney and of counsel, for appellant, argued :—

I. The defendant on the motion of plaintiff's attorney was compelled to elect to proceed upon the alleged counter-claim in the answer as being a counter-claim or a defence, to which the defendant excepted. This the defendant contends was an error. The defendant was not in a position to claim non-performance until plaintiff had held the picnic and has thus, at least to a certain extent, complied with the contract. If plaintiff made representations and they turned out to be untrue, it amounted either to an actual or constructive fraud, because they had no right to assert as a fact the existence of which, or probability of existence of which, was *in future* and was only known to them, and in case of constructive fraud it amounted to a guarantee. The plaintiff thereby not only lost the benefit secured to it by the contract but were liable for any damage which the defendant had sustained, and she was not compelled to pay first and then seek to recover the money paid with damages. *Garner v. Mangam*, 93 *N. Y.*, 642. Under the Code a defendant may set up as many defences or counter-claims as he may have. An objection of inconsistency between them is not available. The contention, that defendant was not bound to elect, is very forcibly sustained in *Bruce v. Burr*, 67 *N. Y.*, 237, which case, although exactly similar, is far less strong than the case at bar, because the defendant at the trial was allowed to amend setting up as an additional defence and as a counter-claim a breach of warranty. On the continuance of the hearing a similar motion was made to compel the defendant to elect between the defence of rescission and breach of warranty which was denied and the denial sustained.

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Appellant's points.

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II. There is no proof whatever that these three men who signed the alleged contract were the committee appointed by the United Italian Societies or the plaintiff corporation, and the proof of the appointment must be made by the production of the records or books of the corporation containing the entry or resolution of appointment. *Owings v. Speed*, 5 *Wheat.*, 424; *Fister v. La Rue*, 15 *Barb.*, 323. And hence the exception to the admission of the alleged contract was well taken.

III. The defendant concedes that if the Italian Societies had held but one picnic and held it in Sulzer's Park, the plaintiff could come within the provisions of the contract. They then would have been a united body for the purpose of the picnic. The word "United" it is true does not mean each and every one of the United Italian Societies, but united for a purpose, *i. e.*, to hold a united picnic. Hence, to ascertain the real meaning of the word it was proper for the defendant to show acts and representations of a similar character as those made to the defendant under similar circumstances. *Cary v. Houghtaling*, 1 *Hill*; *Hill v. Naylor*, 18 *N. Y.*, 588.

IV. If the contention of the defendant prevails that the plaintiff has not proven a legal contract between it and the defendant, then the plaintiff has not established a cause of action and the motion made by the defendant to dismiss, should have been granted.

V. The exclusion of the testimony offered by the defendant, as to what the defendant did in reliance upon the committee's representations was clearly an error. The proposed testimony tended to show the probability of the representations as his Honor Justice FREEDMAN well stated on admitting the proposed testimony on the first trial upon a similar objection, and if the defendant was entitled to prove the damages it was exceedingly material for that purpose. In an action for fraud it is competent to show the conduct and subse-

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Respondent's points.

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quent acts in consequence, and upon the faith of the representations. *Taylor v. Guest*, 58 *N. Y.*, 262; *Bruce v. Burr*, 67 *Ib.*, 237; 36 *Hun*, 465; 38 *Ib.*, 577.

VI. It has been repeatedly held in actions of this kind that it is proper and material for a witness to state whether he would have done certain things, but for the alleged representations. I only need to refer to the learned opinion of INGRAHAM, J., in *King v. Fitch*, 2 *Abb. Court of App. Dec.*, 515, and DENIO, C. J., in same case for this proposition, and as the question proposed was only preliminary and the learned justice below having been apprised of the nature and effect of the testimony it was error to exclude it. If the defendant could have shown by these witnesses that some of the very societies, who plaintiff claims were at defendant's place, were in fact at Jones' Woods, could it be successfully contended that the plaintiff performed his contract? The testimony goes to the very heart of the defence and the exception was well taken.

*Warren W. Foster*, attorney and of counsel, and *Oliver C. Semple* of counsel, for respondent, argued:—

I. It was right to compel defendant to elect either to stand on her alleged counter-claim and to affirm the contract or to abandon the counter-claim as such and to stand on the alleged facts as a defence. Defendant could not have the benefits of a valid contract without bearing its burdens. She could not assume that it was a valid contract and ask damages under it and at the same time insist that it was not valid, and thus escape payment of its obligations. As the learned judge who presided at the first trial well said: "If defendant wants to enforce the contract and to recover damages under it (that is, to enforce her counter-claim of \$1,000 for loss of profits) she must perform her part and first of all pay the \$400 which she agreed to pay on the 20th of September,

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1889. If she does not wish to do that, but wants to contest her liability to pay the \$400, she must drop her counter-claim. But that counter-claim, being pleaded both as a defence and a counter-claim if withdrawn as a counter-claim, is still available as a defence. It is well settled that a party cannot affirm in part and rescind in part." If it was improper for any reason to require defendant to make the election, it was not prejudicial error to exclude the counter-claim because a counter-claim would not lie against the plaintiff in this case, for the reason that the plaintiff made no contract with defendant whatsoever, and was under no liability to her. This is true, whether plaintiff sue as a beneficiary under the rule of *Lawrence v. Fox*, 20 *N. Y.*, 268, or as assignee of United Societies, as admitted by defendant's answer.

II. The court was right in excluding the offered evidence of preparations made for the picnic by defendant. The only theory on which such evidence can be claimed to be admissible is that it goes to show defendant's belief in the representations made. Before this evidence was offered defendant's manager had testified as to the representations. There is not one scintilla of evidence of any representation of any existing fact. Everything related to the future. "They were going to be united; that there was nothing going to be only this one affair." "It is going to be the biggest thing there ever was in New York. They are going to have from 15,000 to 20,000 people there." "They promised me I would take in a great deal of money, and I could afford to do it." "They will fetch a big crowd, and they will have no other picnics on that day excepting in his place." "He should be prepared to expect from 8,000 to 10,000 people." This is substantially all the defendant's evidence as to representations of the committee, and the learned judge rightly said: "The representations, to have any effect and deserve consideration here, must have been as to an existing material fact. Any promise,

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Respondent's points.

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any representation as to what might take place, is of no consequence and cannot have any weight here. Whatever they said that was untrue must have been said in reference to something that then existed. \* \* \* If they said, 'We are going to have 20,000 people; you will make \$5,000 out of this. It is going to be a great day.' That is not a material existing fact. And any evidence of any such promise is not material here."

III. If the defendant wished to rely on the statements of expectations, which she claims plaintiff's committee made to her, it was her privilege, right and duty to exact from the committee a guaranty of the number to be present, or a guaranty of profits. No such guaranty was given, and evidence of defendant's profit or loss is totally irrelevant, and so is the evidence of defendant's preparations, help employed, food ordered, other picnics and where held, etc., etc.

IV. There were only two questions in the case: 1st. Did the committee procure the contract from defendant by representations of existing facts that were false and untrue? 2d. Was the contract substantially performed on plaintiff's part? Now, it will be observed that defendant's answer pleads but two material representations: (1) That the committee represented all united Italian societies of New York City; and (2) that they were composed of many thousand members; but defendant offered no testimony on the trial of any such representations or of any representations of any existing fact made by the committee prior to the contract, whether true or false. All defendant's testimony was as to expectations relating to future events. Defendant's manager was told, when the contract was made, and knew that there were sixteen societies united for the picnic, and that all in New York were not united for it; and it is not disputed or contradicted that the sixteen Italian societies united for plaintiff's benefit did hold the picnic as agreed in defendant's park, and that from 900 to 3,000 were present.

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Opinion PER CURIAM.

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V. The case contains no certificate or statement or proof that the case on appeal contains all the evidence, and therefore this court cannot say that the order denying a motion for a new trial is erroneous as contrary to or against the weight of evidence. *Boyer v. Brown*, 1 *Hun*, 715; *Porter v. Smith*, 107 *N. Y.*, 531; *Murphy v. Board of Edn.*, 6 *N. Y., Supp.* 99.

PER CURIAM.—The case contains no certificate or statement or other proof that the case on appeal contains all the evidence and consequently this court cannot determine that the order denying defendant's motion for a new trial, if such order was made, is erroneous as contrary to the evidence or as against the weight of evidence.

Moreover, the case contains no order denying motion for new trial. A mere exception to the refusal to grant the motion, it has been repeatedly held, presents no question of fact for review.

For the reasons stated the exceptions only can be reviewed, and, if they are found untenable, the verdict of the jury must be held to have conclusively established that the contract sued upon was not procured from defendant by representations of existing material facts that were false and fraudulent, and also that the contract was substantially performed on plaintiff's part.

The trial judge properly compelled the defendant to elect either to stand on her alleged counter-claim and to affirm the contract or to abandon the counter-claim as such and to stand on the alleged facts as a defence. Defendant could not have the benefits of a valid contract without bearing its burdens. She could not be permitted to affirm in part and rescind in part. To such a state of facts the case cited by appellant's counsel (*Bruce v. Burr*, 67 *N. Y.*, 237) has no application.

The offered evidence of preparations made by the defendant for the picnic was properly excluded. The

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Statement of the Case.

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only theory on which such evidence might be admissible, is that it goes to show defendant's belief in the representations made. But no representation is available for that purpose, unless it is a representation as to an existing material fact. It was made to appear that the representations relied upon for rendering the excluded evidence admissible, related to mere expectations, and not to existing material facts. If the defendant wished to rely on the representations of expectations which she claimed plaintiff's committee made to her, she should have exacted from the committee a guaranty of the number to be present or a guaranty of profits.

The questions at issue were fully and fairly submitted to the jury under a charge which carefully guarded every right which the defendant had, and no exception appears anywhere which calls for reversal.

The judgment should be affirmed, with costs.

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AUGUSTA G. GENET, APPELLANT v. THE PRESIDENT, ETC., OF THE DELAWARE AND HUDSON CANAL COMPANY, RESPONDENT.

*Court of Appeals—Remittitur—Entry of judgment in regard to costs—Restitution under the Code, powers of the court below to order the same.*

This is an appeal from an order made at special term by Judge GILDER-SLEEVE granting a motion made by defendant to vacate an order heretofore made in the action setting off costs, and amending the judgment so as to make it include the costs to which defendant was originally entitled, but which were extinguished by the set-off. The complaint stated two causes of action. Upon the trial defendant prevailed upon the first cause of action, and plaintiff upon the second. Each party thus became entitled to costs as against the other. Defendant moved for an order directing that the costs of each party when taxed by the clerk to set off one against the other, and the balance only included in the judgment. This motion

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Statement of the Case.

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was granted by Judge FREEDMAN, and an order entered February 15, 1887, and it is this order which the order now appealed from has set aside. The costs of each party were taxed in pursuance of Judge FREEDMAN's order, those of plaintiff at \$618.67, and those of defendant at \$570.44, and judgment entered in favor of plaintiff for the balance of costs in her favor, \$48.23. Both parties appealed from the judgment to the general term, which affirmed it, and both parties then appealed to the Court of Appeals, which court affirmed so much of the judgment as was appealed from by plaintiff and reversed those parts appealed from by defendant, and dismissed the entire complaint with costs. The remittitur was filed, and the judgment of the Court of Appeals made the judgment of this court February 15, 1892. Defendant presented a bill of costs to the clerk for taxation, including in it the amount of the costs of the trial as originally taxed in February, 1887, and the entire costs of the action, which were allowed by the clerk. Plaintiff appealed against such taxation and Judge MCADAM reversed it, holding that the costs awarded by the Court of Appeals were the costs in that court only, in the following opinion: "MCADAM, J.—The complaint states two causes of action. One at law to recover \$150,000 damages for breach of contract, the other in equity for an injunction and incidental damages. The referee dismissed the first cause of action, but awarded plaintiff judgment on the second. The plaintiff thereupon taxed her costs at \$618.67, and the defendant its costs at \$570.44. Set-off was allowed and the plaintiff in consequence entered judgment in her favor for the equitable relief, with \$48.23, costs (the difference), and the defendant for the dismissal of the first count, without costs (the set-off having absorbed them). Both sides appealed; the judgment on the first count was affirmed by the general term, and the second count (modified in form) was also affirmed thereat 'without costs to either party.' Both sides again appealed, this time to the Court of Appeals, which court expressed its judgment in these words: 'That said judgment so far as appealed from by the plaintiff be affirmed, and that said judgment, so far as appealed from by the defendant be reversed, and the complaint dismissed with costs.' The clerk on application of the defendant taxed defendant's costs in all the courts. This was error. He should have taxed the costs to the Court of Appeals only. *In re* Water Commissioners, 104 N. Y., 677; *Franey v. Smith*, 126 *Id.*, 658. The taxation must therefore be reversed, but with liberty to the defendant to move by way of restitution to vacate the order for set-off and for leave to amend the original judgment roll *nunc pro tunc* by inserting therein in suitable language the costs originally taxed on the dismissal of the first cause of action, to the end that the defendant may not be deprived of them. These belong to the defendant as of right, not by the courtesy of the court but by force of the statute. The judgment made by the Court of Appeals eliminated not only the plaintiff's recovery but the costs allowed to her which were made the subject of set-off. The new condition, final in its character, seems to warrant restitution to the defendant

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Appellant's points.

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in furtherance of justice and to prevent abuse. The control which every court has over its own judgments would seem to sustain the power."

The order now appealed from was moved for in accordance with the suggestions contained in the above opinion, and, on granting the motion, Judge GILDERSLEEVE filed this memorandum: "The question presented on this motion has been passed upon by my learned associate, Judge MCADAM; motion granted without costs; order to be settled in accordance with Judge MCADAM's opinion."

*Held*, That the court at special term had power to order restitution, and the order should be affirmed.

Before FREEDMAN P. J, and DUGRO, J.

*Decided July 5, 1892.*

*George C. Genet*, attorney and of counsel, for appellant, argued:—

I. The judge who ordered the adjustment of the costs by the clerk, set aside, suggested that defendant might recover the costs it had disposed of in a different way before judgment, under the sections of the Code relating to restitution. The defendant thereupon made the motion which has been granted in deference to that opinion. Prior to these sections of the Code, 1323, 1292, restitution could only be had by action. These sections give the court that renders the final judgment this power in connection with the judgment rendered. They do not change or extend the right. Section 1323 provides, "When a final judgment or order is reversed or modified upon appeal the appellate court or the general term of the same court, as the case may be, may make or compel restitution of property or of a right lost by means of the erroneous judgment." The Court of Appeals having rendered the final judgment, the power to order restitution was in that court alone. *Murray v. Bedell*, 90 *N. Y.*, 480; *Market Nat. Bank v. Pacific Bank*, 102 *Ib.*, 464. Section 1292 applies to cases where the final judgment is rendered by the court of original jurisdiction, where an appeal has been taken

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Appellant's points.

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and the judgment reversed and a new trial had, with a result the reverse of the first trial.

II. It is not within the power or jurisdiction of the court of original jurisdiction to alter, vary, reverse or modify a judgment that has been affirmed or finally adjudicated and judgment rendered by the appellate court. *Genet v. Del. Hud. Canal Co.*, 113 *N. Y.*, 475; *Fisher v. Repburn*, 48 *Ib.*, 41, 53; *Embury v. Connor*, 3 *Com.*, 231; *Le Guen v. Gouverneur*, 1 *John. Cases*, 492; *Wilcox v. Jackson*, 13 *U. S. R.*, 511; *People v. Sturtevant*, 9 *N. Y.*, 275; *Smith Lead. Cases, Title Estoppel*; *Merwin v. Brewster Iron Co.*, 56 *N. Y.*, 671. The judgment entered on the return of the remittitur where the Court of Appeals renders a final judgment is the judgment of that court, and not of this court, although it is entered by the clerk of this court on the order of one of its judges. It is made the judgment of this court for the sole purpose of enforcing it. *Wilkins v. Earle*, 63 *N. Y.*, 358; *Kennedy v. O'Brien*, 2 *E. D. Smith*, 41. The order from which the appeal is taken not only renders an entirely new and different judgment, but goes further back still and vacates an order disposing of these same costs on defendant's own motion before the judgment was entered. This was in effect a payment of them by plaintiff and actually prevented them from ever being any part of the judgment appealed from.

III. The defendant now seeks relief under the sections relating to restitution and to reach it, asks to set aside an order made on its own motion and to vacate, change, alter and render an entirely new judgment, and it has been ordered. The plaintiff has never been paid any of these sums by defendant. It is absurd to claim restoration of what has never been received. It would be a misuse of language. It is only where money has been paid that it can be claimed to be restored. See old Code 3369.

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Respondent's points.

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IV. Should the court surmount all these obstacles and conclude that the case comes within its power to order restitution, the plaintiff offers the following objections: (1) That the motion is not for restoration but to cancel and vacate a final judgment and to order the clerk to enter an entirely different one. (2) That except as to the \$125 costs, the defendant could not now tax the bill of costs against her that was taxed in 1887.

*Matthews & Smith*, attorneys, and *Frank E. Smith* of counsel, for respondent, argued:—

I. The set-off of costs was properly vacated. This order was correct when it was made, but the costs of plaintiff which were in effect paid by it, having now been extinguished by the reversal, it now works an injustice which can be corrected only by setting it aside. The fact that the order was made on motion of defendant is no objection to vacating the same now on its motion. *Hatch v. Central Nat. Bank*, 78 *N. Y.*, 487; *Montgomery v. Ellis*, 6 *How.*, 326.

II. The court has power to amend its own records, even after its judgment has been passed upon by the Court of Appeals. In *Corn Exchange Bank v. Blye*, 119 *N. Y.*, 414, *RUGER, J.*, says: "This appeal presents the question whether the court has authority to vacate and annul so much of a judgment in replevin as provided for the payment of damages for the detention of the property, in addition to its return, after four years from the entry of the judgment, *and the same had been affirmed in the court of last resort.* \* \* \* \* It is urged on this appeal by the plaintiff, that the court below had no power to vacate or modify the judgment actually entered, after it had been affirmed by the appellate court. This contention rests upon the question whether the error in entering the judgment raised a question which could be availed of by the defendant on appeal; if it could then, obviously, the court below could not afterwards

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Respondent's points.

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change the substantial character of the judgment affirmed. We think the decisions are uniformly to the effect that when an error has been made in respect to the form of a judgment by which its scope or amount has been enlarged or increased beyond that plainly authorized by a verdict, referee's report or decision of a court, a question is not presented for the consideration of the court of appeal, but the error must be corrected, if at all, by motion in the court of original jurisdiction." The change in the judgment made by the order appealed from does not relate to the substance, but merely the form. It is not asked for on the ground that anything originally done was incorrect, erroneous, or even irregular, but solely on the ground that the reversal of part of the judgment by the Court of Appeals leaves the portion of it, which was affirmed in such shape as to work injustice to defendant, by not including in it the costs, to which defendant is entitled, and which in legal effect were awarded to it by the original judgment.

III. Every court has inherent power over its own orders and judgments and can modify them as justice requires. The existence of this power is well established, though its precise limits may be hard to define. That the extent to which the power was carried by the present order comes well within the limit may be best shown by reference to decided cases. *Genet v. D. & H. Canal Co.*, 113 *N. Y.*, 472; *Hatch v. Central Nat. Bank*, 78 *Ib.*, 487; *New York Ice Company v. North-Western Ins. Co.*, 23 *Ib.*, 357; *Toronto Trust Co. v. C. B. & Q. R. R.*, 123 *Ib.*, 37; *Produce Bank v. Morton*, 67 *Ib.*, 199; *Ladd v. Stevenson*, 112 *Ib.*, 325; *Gasz v. Strick*, 30 *St. Rep.*, 226; *Adams v. Ash*, 46 *Hun*, 105; *Van Denburgh v. The Mayor*, 28 *St. Rep.*, 578.

IV. The amendment made is but a form of restitution. The judgment in plaintiff's favor was used to extinguish the costs for which otherwise defendant would have had judgment. Being now out of the way

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Statement of the Case.

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by reversal, defendant should be put in the position to which it would have been but for the erroneous judgment; that is, with judgment in its favor for the costs as taxed. The power of the court to make restitution does not depend upon statutes, but exists at common law. *Hæbler v. Meyers*, 44 *St. Rep.*, 403.

PER CURIAM.—The court at special term had power to order restitution (*Wright v. Nostrand*, 100 *N. Y.*, 616; *Carleton v. The Mayor*, 19 *Weekly Digest*, 354), and as the method adopted to enforce it carried out the necessary effect of the judgment of the Court of Appeals and rendered it effectual, there is no necessity for condemning it by a reversal.

The order should be affirmed, with ten dollars costs, etc.

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HERMAN STUBER, ET AL., ADMINISTRATORS, ETC.,  
APPELLANTS v. JAMES D. MCENTEE, RESPONDENT.

*Negligence, contributory—Release and settlement of damages.*

The trial judge held in this case, that the plaintiff's intestate was guilty of contributory negligence in doing the work that he, as the apprentice of defendant, was called upon to do in his master's business; also that the payment of \$400 by defendant to Oscar Krause, one of the plaintiffs, might be considered a bar to the action.

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

Appeal by plaintiff from a judgment entered upon the dismissal of the complaint at the trial and from an order denying a motion for a new trial.

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Opinion of McADAM, J.

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The facts and points in the case appear fully from the following statement and opinion filed by the trial judge, upon which the judgment and order is affirmed.

“ William Stuber, an employee of the defendant (a plumber), went down an excavation about thirteen feet deep, by four or five and a-half feet wide, to solder a pipe. The excavation, which was in 116th street, near Eighth avenue, had not been boarded up, and the sides caved in, carrying with them a large stone, completely covering the employee, and causing his death.

“ The action is by his administrators, to recover from the defendant the statutory limit of \$5,000 damages, by reason of the death, which occurred May 12, 1890. On May 18, 1890, the defendant paid to Mr. Krause (who, in conjunction with the father of the deceased took out letters of administration, June 5, 1890), the sum of \$400, and took the following receipt: ‘ This certifies that Mr. McEntee paid this day to me \$400, being payment for all expenses whatsoever, caused by the untimely death of William Stuber, a plumber, assistant in the employ of Mr. McEntee. Further, that I shall have no further claim whatsoever against Mr. McEntee.

‘ N. Y., May 15th, 1890.’

McADAM, J.—“ The authorities bearing on the question of negligence, are so numerous, and the distinctions drawn so subtle, that great care is required in determining which are, and are not, applicable to the case in hand. Slight variations in the facts will be found to distinguish one from another, leaving only the underlying principles which are of an elementary character, to serve as a guide. Indeed, it is as difficult to find ready-made law to fit every case of negligence as it is to get ready-made clothes to fit every individual. There is a process of readjusting, distinguishing, limiting, and explaining going on all the while to make things suit the case at hand, without clashing with what was decided

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Opinion of MCADAM, J.

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before, on facts slightly different, until it has become a study to determine with accuracy which adjudications fit new cases, and which do not.

“Judge PECKHAM thus expresses the situation in *Cullen v. Norton*, 126 *N. Y.*, 5. ‘There is very little room for disagreement as to the principle of law in this class of cases, but the difficulty lies in their application to the facts of each special case.’

“It may be assumed that a ‘master is bound to furnish reasonably safe and suitable implements for the use of the servant and a reasonably safe place of employment, considering the nature of the employment itself. *Cullen v. Norton*, *supra*.’ But where a servant, without any express direction from the master, or any assurance of safety by him, enters an excavation, the dangers of which are obvious and apparent, and consequently as well known to the servant as they would have been to the master, had he been present, it must be held that the servant in doing the imprudent act assumed the dangers consequent upon it, whatever they were. See *Hussey v. Cogger*, 112 *N. Y.*, 614; *Filbert v. D. & H. Canal Co.*, 121 *Ib.*, 207; *McQuigan v. D., L. & W. R. Co.*, 122 *Ib.*, 618. It cannot be said in such a case that the master was negligent and the servant free from fault; and this is a fair statement of the present case. The master could not relieve himself from the duty of supplying and maintaining suitable instrumentalities for the work required, by placing the business in the hands of an agent. *Fuller v. Jewett*, 80 *N. Y.*, 46; *Crispin v. Babbit*, 81 *Ib.*, 521, approved in *Cullen v. Norton*, 126 *Ib.*, 5. In other words, the negligence of a servant does not excuse the master from liability to a co-servant for any injury which would not have happened had the master performed his duty. *Coppins v. N. Y. C. & H. R. R. Co.*, 122 *N. Y.*, 557. Yet the negligence of a co-servant even of a higher grade as a rule defeats a recovery. *Cullen v. Norton*, *supra*.

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Opinion of MCADAM, J.

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There was no attempt to prove that any one representing the defendant told the decedent to enter the excavation or that it was suitable or safe to enter. In *Kranz v. L. I. R. R. Co.*, 123 *N. Y.*, 1, the decedent was *ordered* to aid in cleaning certain water pipes placed underground at the defendant's depot at Bay Ridge. A trench had been opened for that purpose by the section man and laborers under his direction some hours before the decedent commenced work upon the pipes. That was a necessary step to furnish him a proper opportunity for the performance of his duty. He entered the trench and began to disconnect the pipes, and while so engaged the earth caved in upon him, and he died of suffocation. The court held that 'those who opened the trench were performing the *master's duty* to the deceased in preparing a suitable place and opportunity for the labor of the intestate in the discharge of his duty . . . and when the master *ordered* the intestate to perform his work as a machinist in the trenches opened and prepared for him, he had a right to assume that the place had been made reasonably safe by the master through other and competent servants employed by him.' There is no proof here that the defendant ever saw the trench or that it was prepared by him or his employees, as a place for the decedent to perform his work, or that he assumed or performed any duty respecting it. These facts are significant in distinguishing the present from some of the cases cited. In the absence of the express or implied direction from the master to enter the trench in its unprotected condition, or any express or implied representation as to its safety, it is difficult to understand how the legal principle carried to the border line by the *Kranz* case can be extended to the present contention. There was no proof of notice to the defendant of the danger as in the *Pantzar v. Tilly Foster I. M. Co.*, 99 *N. Y.*, 368, and nothing from which it may be inferred. In *McGovern v. Central Vermont R. R. Co.*, 123 *N. Y.*, 280,

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Opinion of McADAM, J.

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the master *directed* the servant to perform work at a place which proved dangerous, and the court held that where such danger may be foreseen and guarded against by the exercise of reasonable care, it is the master's duty to exercise such care and adopt such precautions as will protect the servant. The work in question was performed at a distance from the master's shop, and in an excavation about which perhaps he knew nothing. The performance of the job here was delegated to the servant who by the circumstances was put on his caution as to danger, and he cannot attribute to the master the consequence of a hazard apparent to the eye, and which he was bound to discern, for he knew the master had no one else to represent him at the job, and that in the nature of things he was compelled to rely entirely upon his own judgment as to the safety of the undertaking. In this he erred, but it does not follow that the master became liable for his error of judgment. The master is bound to know that his appliances are reasonably safe, unless the defect be one which could not be discovered by careful inspection or by application of appropriate tests. . *Probst v. Delamater*, 100 *N. Y.*, 266. If the defects are obvious and the dangers apparent the master is not liable. *Hickey v. Taaffe*, 105 *N. Y.*, 26 ; *Shaw v. Sheldon*, 103 *Ib.*, 667 ; *Appel v. B. N. Y. & R. Ry. Co.*, 111 *Ib.*, 550 ; *DeForest v. Jewett*, 88 *Ib.*, 264 ; *Williams v. D. L. & W. R. R. Co.*, 116 *Ib.*, 628. It has been often said that the master is not liable for defects in such things, to a servant whose means of knowledge thereof were equal to those of the master. But this is an erroneous statement. *Sher. and Redf. on Neg.*, 4th ed., § 217. The master has no right to assume that the servant will use such means of knowledge ; because it is no part of the servant's duty to inquire into the sufficiency of those things. The servant has no right to rely upon the master's inquiry ; because it is the master's duty thus to inquire ; and the servant may justly

assume that all these things are fit and suitable for the use, which he is directed to make of them. The servant is liable only in respect to those things, concerning which it is his duty to inquire. *Ib.* The distinction is clear enough, but, picking out the cases in which it is to be applied—difficult. Still, every person, *sui juris*, is supposed to be sensible to dangers at once apparent, and is to be deemed reasonably intelligent enough to avoid them. This natural instinct, necessary to self-preservation, is daily exercised in our large cities, and crowded thoroughfares, in crossing and re-crossing streets, and in country-towns in crossing and re-crossing railroad tracks. The care to be exercised should be commensurate with the danger to be reasonably apprehended.

“The theory upon which *Kranz v. L. I. R. R. Co.*, *supra*, and kindred cases was decided is, that the law remembers that the respective situations of the master and servant are unequal, and excuses the servant for deferring to the superior judgment of the master. If, therefore, the master orders the servant into a situation of danger, and he obeys, and is thereby injured, the law will not deny him a remedy against the master, on the ground of contributory negligence, unless the danger was so glaring that no prudent man would enter into it, even where, like the servant, he was not entirely free to choose. Thus, where a hod-carrier, engaged at work about an excavation, perceiving that it was dangerous, manifested some reluctance to descend it, but was ordered by his employer to do so, and obeyed, and the earth caved in upon him and killed him, it was held that his widow might recover damages of his employer. The order was an implied assurance that there was no danger; the laborer rightfully relied upon the superior information and judgment of the master; and whether he was negligent under the circumstances in descending into the pit is a question for the jury. See cases collated in 2 *Thompson on Neg.*, 975; *Ib.*, 976, § 5. In these cases, it is a natural yielding to

a superior who commands, and the servant, like the soldier, is supposed to obey, relying on the knowledge and ability of the commander. There are cases, however, where the master is not liable for defective machinery or improper appliances, among which are those : (1) Wherein the defects and dangers are so obvious as to become known to the servant. The maxim *volenti non fit injuria* applies in such cases, for as a general proposition that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasions his loss. TINDAL, C. J., 2 *Scott, N. R.*, 257. And the master is under no higher duty to provide for the safety of the servant, than the latter is to look for his own safety. (2) Wherein a skilled engineer is placed in charge of an engine, the master not being a skilled engineer himself. Here the master relies on the judgment of the servant as to the safety of the machine, and not the servant upon the master. *Thompson on Neg.*, *supra*, p. 980. And yet this presumption may be overcome by proof that the master knew of defects, the servant, without fault, had not discovered. (3.) Wherein an excavation is made by the servant himself in the absence of the master or an *alter ego* and the earth caved in, the servant must be held to have assumed that risk as incidental to his employment, for there is no possible basis for the claim that he relied upon his master's superior judgment, or upon any express or implied assurance of safety by him.

“ In *Leary v. R. R. Co.*, 139 *Mass.*, 580, Mr. Justice DEVENS uses these words : ‘ But the servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and while ordinarily he is to be subjected only to the hazards incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty to take such precautions.’ The situation

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Opinion of MCADAM, J.

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here plainly told the servant he must rely upon his own intelligence, and he presumably so relied, and there is no theory upon which personal negligence, the gist of the action, can be imputed to the master. Before he can be charged, knowledge of the defect or danger must be brought home to the employer, or proof given that he omitted the exercise of proper care to discover it. *Devlin v. Smith*, 89 *N. Y.*, 470.

“The defendant could not be negligent unless he did something he ought not to have done or failed to do something he should have done, and this must be determined from what he knew or ought to have known from the circumstances existing at the time. The mere fact that an accident occurred which caused an injury is not generally of itself sufficient to authorize an inference of negligence. *Dobbins v. Brown*, 119 *N. Y.*, 188; *Cosulich v. Standard Oil Co.*, 122 *Ib.*, 118. And this upon the principle that if the evidence would justify an inference consistent with the absence of negligence on the part of the defendant just as well as it would an inference of negligence the plaintiff cannot recover. See cases collated in 1 *Sher. and Red. on Neg.*, 4th ed., p. 69, note 1. There is here no proof, as in *Kranz v. L. I. R. R. Co.*, *supra*, that a separate gang of men (not including the person injured) made the trench, and that the employer *ordered* the decedent into it to do other work. Inferentially, the trench was dug by the decedent himself, or he went into it without the directions of the employer and in his absence, and before it was made safe by boarding up the sides. There being no evidence upon the subject, this is the inference, for the law will not infer negligence as a ground of action, where the absence of it is as consistent as its presence.

“The former presumption that every person will take care of himself from regard to his own life and safety cannot take the place of proof. *Cordell v. N. Y. C. & H. R. R. R. Co.*, 75 *N. Y.*, 330; *Riordan v. S. S. Co.*,

36 *N. Y., State R.*, 476. The burden is on the plaintiff to prove that there was no contributory negligence on the part of the deceased, *Hart v. H. R. B. Co.*, 84 *N. Y.*, 57; *Hale v. Smith*, 78 *Ib.*, 480; *Muhr v. The Mayor*, 15 *Daly*, 12; *Tolman v. S. B. & N. Y. R. R. Co.*, 98 *N. Y.*, 198, unless the nature of the accident or the state of the proofs, show the absence of contributory negligence. It will not do to allow jurors to found verdicts on anything but facts established by evidence or inferences properly drawn from those facts, or as the Court of Appeals of Maryland, held in the Baltimore and Potomac R. R. case, January, 14, 1892. Speculations as to how or from what cause an accident occurred cannot be allowed to stand for proof, or be made the basis of a verdict in favor of the party upon whom the burden rests. There must be evidence from which the jury may reasonably and properly conclude that the accident was produced by some negligence or wrongful act of the defendant.

“There was no solid legal ground for holding the defendant liable for the unfortunate accident that befell the decedent, and no error in withholding the case from the jury. If a plumber, tinsmith, or carpenter sends an employee out to do a job about which the master knows nothing, the latter is not an insurer of the safety of the undertaking, and is not liable if he gives no positive direction or assurance. The duty of inquiry would clearly be cast upon the servant in such a case.

“The second branch of the defence relates to the payment of the \$400. This sum was paid to Krause, May 15, 1890, and he immediately turned \$60 over to the father of the deceased, who received it knowing that \$400 had been accepted in payment.

“The subsequent administration by Krause and the father, by operation of law, related back and made the payment to them, as in their representative capacity. See *Priest v. Watkins*, 2 *Hill*, 225; *Hart v. Marine Ins.*

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Opinion PER CURIAM.

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Co., 8 *Johns.*, 126 ; 1 *Williams on Exrs.*, 240 ; 39–76, Farrell's Estate, 1 *Tucker R.*, 110 ; Joyce v. McGuire, 2 *City Ct. R.*, 422. The damages recoverable being unliquidated in their character (Code, § 1904 and notes), this payment amounted to an accord and satisfaction. Coon v. Knap, 8 *N. Y.*, 402 ; Berrian v. The Mayor, etc., 4 *Robt.*, 538 ; Danziger v. Hoyt, 120 *N. Y.*, 190 ; and see Jaffray v. Davis, 124 *N. Y.*, 164, which discharged the cause of action, if any existed.

“For the reasons stated, the nonsuit was rightfully directed, and the motion for a new trial must be denied direct.”

*A. Edward Woodruff*, for appellants.

*Thomas C. Ennever*, for respondent.

PER CURIAM.—The judgment and order should be affirmed, with costs, upon the opinion filed by the learned trial judge on the denial of the motion for a new trial.

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Opinion of McADAM, J.

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AMOS E. WOODRUFF, APPELLANT v. ALEXANDER  
JOHNSTON, RESPONDENT.

*Demurrer to complaint in action in equity to vacate and set aside a judgment as being founded in fraud, etc.*

To the complaint in this action a demurrer was interposed setting forth various grounds. The court below considered only the fourth ground of demurrer, namely: that the complaint does not state facts sufficient to constitute a cause of action; and sustained the demurrer.

*Held*, that the judgment should be affirmed.

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

Appeal by plaintiff from a judgment in favor of defendant, entered upon a decision sustaining defendant's demurrer to the complaint, etc.

The facts and points of the case appear fully from the following opinion of the judge at special term.

McADAM, J.—“The bill demurred to is in equity to set aside, for fraud and perjury, a judgment had after a trial, in which the jury found for the defendant. The rule is that where the remedy is ample at law, chancery will not interfere, 3 *Gray & Wat. on N. I.*, 1478. Where a party goes into equity to impeach the justice and equity of a verdict, it must be upon grounds which either could not be made available to him at law or which he was prevented from setting up by fraud, accident or the wrongful act of the other party, without any negligence or fault on his part. *Vilas v. Jones*, 1 *N. Y.*, 281, 282. The jurisdiction in one court to vacate, in an independent proceeding, the judgment of

another having power to render it, is in its nature so extraordinary as to demand a close adherence to principles and precedents in exercising it. Courts do not exercise it when there has been negligence on the part of the party seeking the relief. That a judgment is final and conclusive of the right or thing which is adjudicated by it, is the rule, and judgments and decrees of a competent court will not be annulled for a suspicion of fraud, or because the party complaining may in fact have been unjustly cast in judgment. *Smith v. Nelson*, 62 *N. Y.*, 288. It would impair the sanctity of judgments and the faith we repose in them if they could be set aside in equity upon grounds available upon mere motion addressed to the courts which rendered them. Those courts should have the opportunity of vindicating their own honor and the integrity of their proceedings. Where they are powerless to do it, it is time enough for equity to tender its aid. It is settled law (with few exceptions, which do apply here) that false testimony given by a party in an action at law, is not ground for equitable relief in chancery. *U. S. v. Throckmorton*, 98 *U. S. R.*, 61; *The Mayor v. Brady*, 115 *N. Y.*, 599; *Smith v. Nelson*, 62 *Ib.*, 286; *Same v. Lowery*, 1 *Johns. Ch.*, 320. There must be a conviction before even a new trial on the ground of perjury will be granted, *Holtz v. Schmidt*, 44 *N. Y. Super. Ct.*, 327, and no conviction has been had here. Judgments and decrees obtained by fraud or imposition may undoubtedly be annulled in equity, but not by parties to the record who were before the court and heard respecting the matters complained of. Though the plaintiff was not actually a party to the record, his assignee, with his knowledge and approval, was. The plaintiff and the defendant were witnesses and disagreed as to the material facts, the former testifying one way and the latter the other, and for this conflict (not unusual in the trial of a cause) the plaintiff seeks a new trial of the issues by a cancella-

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Opinion of McADAM, J.

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**AMOS E. WOODRUFF, APPELLANT v. ALEXANDER  
JOHNSTON, RESPONDENT.**

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*Held*, that the judgment should be affirmed.

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*Decided July 5, 1892.*

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EVE, JJ.

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Opinion of McADAM, J.

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McADAM, J.—“John Potter, a car inspector in the defendant's employ, was inspecting certain of its cars when a train of other cars propelled by two engines suddenly switched backward on to the middle track, pushing together the cars between which he was at work, crushing him to death. He had no warning. The court sent the question of negligence to the jury, and they awarded his widow and administratrix \$5,000 damages. The defendant insists it was error not to nonsuit the plaintiff, and cites *Besel v. N. Y. C. & H. R. R. Co.*, 70 *N. Y.*, 171, to sustain its claim. Whether the defendant performed its duty to its employee was, on the evidence, and the inference to be drawn from it, a question for the jury. *Abel v. D. & H. C. Co.*, 103 *N. Y.*, 581; *S. C.*, 128 *Ib.*, 662. The jury were properly instructed as to the law, and their verdict on the fact is sufficiently supported by the proofs. True, it was incumbent on the plaintiff to show affirmatively that the negligence of the defendant was the sole cause of death. But it was unnecessary to do this by positive and direct evidence of negligence of the defendant, and of freedom from negligence of the deceased. The proofs may be indirect, and the evidence had, by showing circumstances from which the inference is fairly and logically to be drawn, that these essential facts existed. When, from the circumstances shown, inferences are to be drawn which are not certain and incontrovertible and may be differently made by different minds, the question is one for the jury. See note to 39 *Am. R.* at p. 513; *Hays v. Miller*, 70 *N. Y.*, 112; *Powell v. Powell*, 71 *Ib.*, 71; *Hart v. H. R. B. Co.*, 80 *Ib.*, 622; *Gchsenbein v. Shapley*, 85 *Ib.*, 224. The inferences to be drawn from the evidence were sufficient to warrant the jury in finding that the defendant had not given reasonable protection to its employee while in the performance of his work, and that its breach of duty and negligence resulted in his death. The motion

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Appellant's points.

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for a new trial must be denied. Forty days' stay of execution after notice of entry of judgment, and a like time to make a case."

*Frank Loomis*, attorney, and *D. W. Tears* of counsel, for appellant, argued:—

I. The court erred in refusing to dismiss the complaint or direct a verdict for the defendant. (a) The plaintiff failed to sustain the burden resting upon her of showing that the accident was due to the negligence of the defendant. In an action against a master by a servant, to recover for an injury received by the servant, in the course of his employment, the plaintiff must allege and prove that the injury was caused by the default of the master as to some duty due from the master as such to the servant. The plaintiff cannot recover if it appear that the injury was caused or contributed to by his own negligence or by the negligence of a fellow-servant, or if it appear that the injury may have been due either to the negligence of the master or of the plaintiff or of a fellow-servant. *Rose v. B. A. R. R. Co.*, 58 *N. Y.*, 217, 222. In this case, if in the usual course of business of the defendant, no provision was made for the protection of the car-inspector who went temporarily between the cars, and that course of business was known to the plaintiff's intestate (and from his length of service, it must be presumed that it would be known to him), he took the risk and his representative cannot recover. A method of protection in use among railroads is referred to in *Abel v. D. & H. C. Co.*, 103 *N. Y.*, 581; *S. C.*, 128 *Ib.*, 662 (the case upon the authority of which the court denied the motion to set aside the verdict and grant a new trial), that is to say, the putting out of some kind of signal when the car-inspector is between or under cars; and the railroad company is considered to have discharged its duty when it has provided and promulgated

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Appellant's points.

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suitable rules upon this subject. But the failure or omission of the railroad company in this respect must be alleged and proved; and in the absence of any allegation or proof upon the subject, it must be presumed that this defendant had provided similar rules or some method other than having a brakeman on top of the cars to guard against such an accident as happened to the plaintiff's intestate, and that the failure to employ such rules or other method was due to the negligence of the plaintiff's intestate or of a fellow-servant. *Rose v. B. & A. R. R. Co., supra.* JOHNSON, J., at p. 221: "It does not appear . . . whether any regulations on the subject, either by a prescribed time-table or otherwise, had been made by the company. But it is obvious that the company may have prescribed proper and safe rules in respect to the starting of these trains, and that those rules may have been disregarded by the persons who actually started these trains so near together." It will be observed furthermore that in the Abel case the plaintiff alleged as the ground of negligence that the defendant had failed to make suitable rules for the protection of car-inspectors; and the cause of action was made out by showing that the defendant had failed to make a certain rule on the subject, in force on the railroad of the defendant in the case at bar. *Abel v. D. & H. C. Co., supra.* It may be assumed, therefore, that if, in the case at bar, the plaintiff had alleged as the negligence of the defendant giving her a right to recover, a failure to make suitable rules and regulations, the defendant would have been prepared to introduce and prove its rule which was proven by the plaintiff in the Abel case and commented upon by the court as being "certainly a very efficient rule." The plaintiff, in her complaint, charges liability upon the defendant solely for the omission to have a flagman on the top of the moving cars, to signal the engineer to stop because of other cars upon the same track; but when it appeared on the trial,

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Appellant's points.

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that the colliding cars were detached from the engine, this theory of liability was necessarily abandoned and the plaintiff, apparently, and properly assuming that if there had been a brakeman on top of the moving cars, he would have controlled the movement so as to prevent the contact with the stationary cars, or so that the contact would have resulted in no injury to the plaintiff's intestate, sought to hold the defendant liable upon the allegation that there was no such brakeman on the moving cars. It is difficult to see the force of this theory, because if there were a brakeman at the west end of the moving cars, he could not have seen the deceased or known that he was between the cars. At all events, this theory of liability cannot stand, because it selects only one of various methods by which the plaintiff's intestate might have been protected. *Rose v. B. & A. R. R. Co., supra.* This theory cannot stand, even if it were correct in principle, because it does not appear that it was the duty of the defendant to place a man on top of these cars for the purpose of giving warning, or that a man so stationed could have given warning to persons between cars whom he could not see, or that it was customary on the defendant's or other railroads to do so, and because it does appear that a sufficient number of men were provided by the master for the movement and control of these cars for one of them to have been on top of the moving cars, and to have acted in the only way in which his action would be proper, that is, by applying the brakes. *Besel v. N. Y. C. & H. R. R. R. Co., 70 N. Y., 171; Berrigan v. N. Y., L. E. & W. R. R. Co., 42 N. Y. St. Rep., 858.* It also appears without dispute that there was a brakeman on top of the moving cars at the time they were "kicked off" from the train; and there being no allegation of impropriety on the part of the defendant in the employment of this man or in his continuance in employment, his failure to act as the plaintiff's testimony might be deemed to tend to

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show, was the negligence of a fellow-servant, the misjudgment of a fellow-servant, on account of which no recovery can be had. *Besel v. N. Y. C. & H. R. R. Co., supra*; *Berrigan v. N. Y., L. E. & W. R. R. Co., supra*; (b) If from any view of the testimony it could have been found by the jury that the brakeman was not on the kicked cars at the time of the collision, or was not on them at all, yet the defendant cannot be held liable because the testimony shows without contradiction, or the possibility of a contradictory inference, that a brakeman to render the service had been employed, and was present in the yard at the time of the occurrence, with the duty of being upon, and regulating by the application of the brake, the movement of these cars. *Reichel v. N. Y. C. & H. R. R. Co., 130 N. Y., 682.* (c) The plaintiff failed to show that the deceased himself was free from negligence contributing to his death. On the contrary, it appeared without dispute that the deceased did contribute to his death by going in between the cars. The cars were found to be defective before he went in between them; and it was undisputed that his duties did not require his going in between the cars; that this inspection should have been made from the outside, and that in the course of the defendant's business, no notice would be given to him of approaching cars if he went between the standing cars under such circumstances. *Laeroy v. N. Y., L. E. & W. R. R. Co., 43 N. Y. St. Rep., 711.* If, for any reason, he deemed it necessary to go between the cars, he was negligent in not first stationing his fellow inspector, Lanigan, as a lookout, or putting out a blue flag.

II. The court erred in its refusal to charge as requested by the defendant, and in its modification of those requests.

*Abram Kling*, attorney and of counsel, for respondent, argued:—

I. The law imposes upon a railroad company the duty

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to its employees to protect them from injury, and the failure so to do is a negligence for which they are liable. First.—It was established by the plaintiff on the trial that the plaintiff's intestate was in the employment of the defendant on the 20th of April, 1891, as an inspector of cars, and while thus engaged in the performance of his duties in the inspection of two cars on a side-track upon which were stored these cars which he was inspecting pursuant to the directions of his master, the defendant switched or kicked two cars upon this track, and which collided with the two cars between which the intestate was at work. Said cars so switched or kicked upon this track had no brakeman or employee upon them so as to control or stop them, and by reason of the defendant's negligence in failing to place brakemen upon these cars they collided with the cars between which the intestate was so engaged, telescoping the cars and causing the decedent's death. The failure of the defendant to surround the intestate with such safeguards as was necessary for his protection while in the defendant's employment, or by placing brakemen upon these cars, or giving him notice of their intention to "kick" or switch these cars upon the storage track, was negligence for which the defendant was liable. In *McGovern v. The Central Vermont Railroad Company*, 123 *N. Y.*, 281, the court said: "It is the duty of the master having control of the times, places and conditions under which the servant is required to labor to guard him against probable danger in all cases in which that may be done by the exercise of reasonable caution. The master is required to furnish the servant adequate and suitable tools and implements for his use, a safe and proper place in which to prosecute his work, and when they are needed, the employment of skillful and competent workmen to direct his labor and the performance of his duties." It has been held, "That reasonable care on the part of a servant in the performance of his work

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pre-supposes the performance by the master of his duty to do all that reasonably lies within his power to protect the servant while so engaged. When directing the performance of work by the servant in a place which may become dangerous and such danger may be foreseen and guarded against by the exercise of reasonable care and prudence on the part of the master, it is his duty to exercise such care and adopt such precautions as will protect the servant from avoidable danger. This is the master's duty, and however he may choose to exercise it, whether through the supervision of a superintendent or some lower grade of employment, it still continues his duty, and not until he shows that it has been properly performed can he claim exemption from liability for injuries occasioned by its non-performance." Second.—In this case the defendant admitted that it owed a duty to the intestate to protect him by the presence of a brakeman upon the moving car; for it requested the court to charge the jury as follows: Defendant's counsel: I ask your Honor to charge, "that under the pleadings and proof in this case, the defendant was under no obligation to protect the deceased, except by the presence of a brakeman on the moving cars." It became a question of fact under the pleadings and proof whether the defendant did protect the deceased by the presence of a brakeman upon the moving car. The jury found in favor of the plaintiff upon this issue, and their verdict is conclusive. Third.—The evidence in behalf of the defendant, that they had a brakeman upon the moving cars which collided with the two cars between which the intestate was at work, was false, for if such brakeman had been upon said moving cars, they would not have been destroyed by reason of the collision, as shown by the testimony of plaintiff's witness; and it is most conclusively established by the fact that the brakeman alleged to have been upon these cars was never called as a witness in behalf of the defendant.

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Respondent's points.

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II. The defendant's requests to charge to which exceptions were taken are untenable. First.—The request to charge that if the jury believe that the two moving cars were in charge of a brakeman on the cars, the verdict must be for the defendant, was properly refused. The court said: "I will charge that if this corporation entrusted the management to the charge of competent brakemen and the fault was theirs, the company is not liable. If the company failed in that duty they may be guilty of an act of negligence, and I will leave the question of negligence entirely to you." If the master performs his full duty in the employment of competent servants, and uses every reasonable safeguard which the exigencies of the case call for, and the servant fails to perform the duty, it is a neglect of a fellow-workman for which the master is not liable. In *Coppins v. The New York Central and Hudson River Railroad Company*, 122 *N. Y.*, 557, the court held: "That a railroad company owes to its employees the duty of employing, so far as it can with reasonable care, only competent men in the management of its road;" and upon the well settled rules of law, the court properly refused to charge the request, as a competent brakeman was essential to allow the defendant to escape from liability. Second.—The request to charge that if the accident was caused by the absence of a brakeman upon the moving cars, the verdict must be for the defendant, provided a brakeman was employed by the defendant and was present in the yard at the time of the accident, was properly refused for the following reasons: (1) The defendant had already requested the court to charge that under the pleadings and proof in this case the defendant was under no obligation to protect the deceased, except by the presence of a brakeman upon the moving car. And the defendant now desired the court to charge a proposition the reverse of the one already requested and inconsistent with it, so that the court should stultify itself by charging that if

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the accident was caused by absence of a brakeman upon the moving cars the company was not liable. No court will allow a litigant to present a request to be submitted to a jury when the same is inconsistent with a proposition already submitted for the consideration of the jury by the same party in that action. Such procedure, if allowed, would tend to bring the administration of justice in contempt by having the court instruct a jury at a request of the party in two different ways upon the same question. (2) This request to charge was properly refused, as it was an abstract proposition unsupported by the evidence. It was the defendant's defence, that they had a brakeman on this car which caused the death of the decedent, and whether the brakeman was in the yard or not, had nothing to do with the question before the jury. A court is not bound to submit a mere abstract proposition to a jury. *Moody v. Osgood*, 54 *N. Y.*, 488; *Hine v. Bowe*, 114 *Ib.*, 350. (3) The court properly refused to charge this request: "That if the accident was caused by the absence of a brakeman upon the moving cars, the verdict must be for the defendant, provided a brakeman was employed by the defendant and was present in the yard at the time of the accident, for the reason that the employment of brakemen by the defendant and not connected with the train or cars which was switched or kicked upon the storage track, would not screen the defendant from liability." It will be observed that the court stated to counsel: That if the company employed a brakeman connected with this car, and he failed in his duty, the company was not liable. But the mere employment of a brakeman without the exercise of such care and adoption of such precautions in switching these cars as would protect employees working upon the road, was negligence for which it was liable. If the defendant fails to place brakemen upon its cars which they are switching from track to track, the fact that they have employed brakemen in their yard would have

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Opinion of McADAM, J.

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no more effect in protecting them from liability than if they were employed to work in the city of Buffalo.

PER CURIAM.—For the reasons set forth in the opinion of the court below, the judgment and order appealed from are affirmed, with costs.

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WILLIAM P. ROOME, ET AL., APPELLANTS v. FRED-  
ERICK C. JENNINGS, ET AL., RESPONDENTS.

*Order of attachment in an action to recover damages for injury to personal property.*

In this case the attachment was vacated on the ground that the pleadings and affidavits did not show an injury to personal property within the meaning of section 635, of the Code of Civil Procedure, and from that order of vacation plaintiffs appeal. *Held*, that the order is affirmed on the opinion of the court below.

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

Appeal from an order of the special term vacating warrant of attachment.

The facts and points in the case appear from the following opinion of Judge McADAM, upon which the order was affirmed.

McADAM, J.—“The attachment was obtained on the ground of ‘an injury to personal property in consequence of fraud’ (*Code*, § 635, subd. 3), a term which is defined to mean an act whereby ‘the estate of another is lessened, other than a personal injury or breach of con-

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Opinion PER CURIAM.

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tract.' *Code*, § 3343, subd. 10. The defendants never obtained possession of the plaintiffs' property, as in *Whitney v. Hirsch*, 39 *Hun*, 325, did no actual injury to it, but made a contract to purchase the property, which contract the plaintiffs rescinded because they discovered that the defendants, who assumed to act as brokers, were in fact acting as principals. The market fell, and the plaintiffs insist that they lost in consequence \$7,500. The defendants may be liable for breach of duty and the difference in value may be the measure of recovery, but it does not follow that they injured the plaintiffs' property within the legal meaning of that term. See *Tracy v. Leland*, 2 *Sandf.*, 730; 3 *Code R.*, 37; *N. Ry. of France v. Carpentier*, 13 *How.*, 222; *Teaz v. Christie*, 2 *Abb.*, 259. The defendants did nothing to lessen the estate of the plaintiffs, which remains as before, and it was not affected, except as to value, a thing controlled entirely by the fluctuations of the market, which at times rises and falls. The word injury as used in the Code is not so elastic as to yield to such a changeable construction, but upon something which takes away the property, deprives the owner of its possession or inflicts some lasting injury upon it by direct means. The motion to vacate the attachment must be granted, with \$10 costs."

*F. A. Thompson*, attorney, and *James J. Allen* of counsel, for appellants.

*Putney & Bishop*, attorneys, and *James L. Bishop* of counsel, for respondents.

PER CURIAM.—The order appealed from is affirmed, with ten dollars costs and disbursements, on the opinion of the court below.

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Opinion of GILDERSLEEVE, J.

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THOMAS C. SMITH, RESPONDENT v. THE COLLEGE  
OF ST. FRANCIS XAVIER, ET AL., APPELLANTS.

Stay of proceedings in one action where two actions have been commenced, in both of which it is claimed the parties are the same, and the entire relief sought in the one case can be obtained in the other.

*Held*, that the order of the special term, denying a stay, should be affirmed upon the opinion of the judge thereof.

Before FREEDMAN, P. J., and DUGRO, J.

*Decided July 5, 1892.*

Appeal by defendant Mary Lavelle from an order made at special term, denying her motion to stay proceedings. The facts and points in the case appear from the following opinion of the judge at special term upon which this order was affirmed.

GILDERSLEEVE, J.—“ I do not think this action and the one in the Supreme Court are identical. The papers before me do not disclose a state of facts that warrant the granting of a stay in this action preceding the determination of the Supreme Court action. It will not be denied that when two suits are commenced in different courts, and the subject of the action and the parties are the same in each, the court which first acquires jurisdiction should dispose of the whole matter. *McCarthy v. Peake*, 18 *How.*, 138. But the parties to these two actions are not the same, inasmuch as John Gorman, who appears as one of the defendants in the Supreme Court case, is not mentioned in the Superior Court suit. What his interest is does not appear; but the fact remains that the parties to the two suits are not identical.

Appellant's points.

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It is true that the property involved is the same in both actions ; but that is not a sufficient reason for granting the stay. *Stowell v. Chamberlain*, 60 *N. Y.*, 272 ; *Dawley v. Brown*, 79 *Ib.*, 398—400. It is also true that all the relief demanded in the Superior Court case, which is the junior action, is demanded in the Supreme Court case, but the complaint in the latter case alleges additional matter, and the prayer asked for more than is sought in the Superior Court case. The same evidence would not support both actions, inasmuch as more evidence would be required in the Supreme Court case than would be necessary in the Superior Court case. See *Stowell v. Chamberlain*, *supra*. To sustain a plea of former action pending, which is governed by the same principle as a motion for a stay (*Dawley v. Brown*, *supra*), it is necessary that it appear that the first action is for the identical relief demanded in the second action, *Dawley v. Brown*, *supra* ; *Kelsey v. Ward*, 16 *Abb.*, 102—103, affirmed, 38 *N. Y.*, 83. So closely has this rule been enforced that, in the case of *Kelsey v. Ward*, *supra*, which is quoted with approval by the Court of Appeals in the case of *Dawley v. Brown*, *supra*, it was held that the pendency of actions for rent alleged to be payable quarterly was no defence to an action for the same rent under a claim that it was payable at the end of the year. Under the circumstances, the motion for stay is denied, without costs."

*W. Tazewell Fox*, for appellant Mary Lavelle, argued :—

I. Where two suits are commenced, and the subject matter of the action of both suits and the parties are the same, and the entire relief demanded and sought in the one case can be obtained in the other, the one last brought will be stayed. *Baylies' Trial Prac.*, 35 ; *McCarthy v. Peake*, 18 *How.*, 138. The reasoning in the latter case is decisive of this appeal. The court

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must not be misled by the use of the term "issues," by the counsel for the respondent, as if it were synonymous with the "subject matter" of the action. It is not necessary for the court to know what the "issues" are. If the "subject matter" is the same as disclosed by the complaints and the parties the same, the junior action will be stayed. *McCarthy v. Peake, supra*. The cases of *Stowell v. Chamberlain*, 60 *N. Y.*, 272, and *Dawley v. Brown*, 79 *Ib.*, 398, relied upon by the learned judge at special term, are clearly distinguishable from the present case. The phrases "property involved" and "subject matter" are not convertible terms. In *Stowell v. Chamberlain*, the "property involved" was the same in both of the actions considered, but the "subject matter," was entirely different. In the one case, the subject matter was a contract (see the first line of Judge ALLEN's opinion at page 274), and in the other, the "subject matter" was a tort (see top of page 276 in same case). Of course, the same evidence could not, therefore, have sustained both actions. The case of *Dawley v. Brown, supra*, also cited by the learned special term judge to sustain his opinion, so far from aiding the respondent, is a strong authority for the appellant. At the bottom of page 399, it distinctly decides that if the "same title is sought to be litigated in both actions," relief will be granted, either by granting a stay in the second action, or by sustaining a plea of former action pending. The two cases considered in *Dawley v. Brown, supra*, presented two distinct titles, and therefore the same evidence would not sustain both actions, which were in ejectment. This case nowhere decides that "it is necessary that it appear that the first action is for the identical relief demanded in the second action." All that it says is, that the "causes of action" must be the same. Still less does *Kelsey v. Ward*, 16 *Abb.*, 102-103, sustain the respondent. It is palpable that the causes of action were entirely different. Both were for rent, but the

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“subject matter” of one action was a contract calling for payments quarterly, and of the other an entirely different contract calling for payments yearly.

II. The cause of action, or the “subject matter” of the two suits under consideration on this appeal is identical. What is the “cause of action” in these two suits as disclosed by the two complaints? Why the partition of the identical property—and before either suit can go to judgment the title of the property must be proved. It is the same title in both actions which must be proved, and so falls strictly within the rule laid down in *Dawley v. Brown, supra*. The identical evidence must be given in both actions, before judgment can be had, and it matters not whether it be given upon issues raised between the defendants among themselves in the Superior Court action, as permitted by action 1543 of the Code, or upon the issues raised by the complaint and answers in the Supreme Court case. In each case the identical title, the same “subject matter,” is to be litigated, and the same relief granted to all of the parties, viz., the sale of the identical property and the proper distribution of the proceeds among those entitled thereto. In either case the identical questions have to be passed upon and litigated, and upon the identical evidence. It matters not whether that evidence come from plaintiffs or defendants, *Hornfager v. Hornfager*, 6 *How.*, 279. Prior to the adoption of the Code, questions of title could not be litigated in partition suits, but now section 1543 makes express provision for such litigation in partition actions. *Knapp on Partition*, p. 172; *Knapp v. Burton*, 7 *Civ. Pro. Rep.*, 448; *Hulse v. Hulse*, 23 *State Rep.*, 123, and *Shannon v. Pickell*, 2 *Ib.*, 160, expressly decide that questions of title may be decided in partition actions. See, also *Hornfager v. Hornfager, supra*. The case of *Van Schuyver v. Mulford*, 59 *N. Y.*, 426, was decided prior to the adoption of the Code, and is no longer applicable. The College of St. Francis

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Xavier is not in possession adversely and its alleged deed is an absolute nullity. *Gridley v. College of St. Francis Xavier, Supreme Court, General Term, Second Department*, decided February, 1892, and not yet reported.

*George Bliss*, for appellant The College of St. Francis Xavier, argued :—

I. The causes of action are not really identical. But passing that, it is clear that the Lavelle action cannot be maintained. It is an action in partition. The moving affidavit shows this, as does the complaint. But the complaint shows that the Lavelle action cannot be maintained, for it shows that the plaintiff and the defendant, the College of St. Francis Xavier, are not tenants in common. The complaint denies that the college is a tenant at all; it shows, if its statements are true, that the college is holding adversely and denying plaintiff's title. But it is familiar law that, if the possession is adverse, partition will not lie. *Code*, § 1532; *Florence v. Hopkins*, 46 *N. Y.*, 182; *Van Schuyver v. Mulford*, 59 *Ib.*, 426. Section 1537 of the Code does not help the plaintiff in the Lavelle case. That section relieves the plaintiff from the necessity of being in possession to maintain partition where a devise is claimed to be void, but does not do away with the rule that the possession must not be adverse; certainly not except in a case where the adverse possession is based upon the alleged void devise. It cannot have that effect where the adverse possession antedates the death of the testatrix, and was adverse to her. There are different parties to the two actions. Gorman is not a party to the Lavelle action.

II. There must be more proof in the Supreme Court action than in the action in this court. The court cannot say that the issues in the two actions are the same. Neither of the answers is in the printed case. The moving party, therefore, does not seem to consider them

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Opinion PER CURIAM.

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before the court for the purposes of this motion. An examination of the two complaints does not indicate that the issues are the same. In the Lavelle case, for instance, the validity of the alleged inquisition of idiocy is directly drawn in question. So is the validity of the devises in the will of Ann Owens, and the capacity of the devisees to take. It cannot be inferred from the identity of the defendants that their answers put in issue the same matters. For instance, in this suit, Mrs. Lavelle, as the person in occupation, is a proper, if not necessary, defendant, and her presence does not necessarily imply that she asserts her ownership, nor that her defence involves the question of the invalidity of the inquisition nor the illegality of the devises.

*Alexander B. Johnson*, for respondent, argued :—

I. Plaintiff's action is one of simple partition. The Lavelle action assails the validity of the deed made by Ann Eliza to the college, and asks for its cancellation. Section 1537 of the Code allows a suitor in partition to assail a devise in a will, but the Lavelle action goes far beyond that, and asks to remove this deed from record. It therefore follows that the causes of action are not the same. Mrs. Lavelle is a stranger to the title. Proof will be required to maintain the Lavelle action that will not be required in this action. The relief demanded is not the same. Mrs. Lavelle demands relief by setting aside the deed without which she could have no standing in court.

II. The two actions are not between the same parties. It is well settled that the causes of action must be identical and the parties the same. *Kelsey v. Ward*, 16 *Abb.*, 98, *affd.*, 38 *N. Y.*, 83; *Hain v. Baker*, 5 *Ib.*, 357; *Stowell v. Chamberlain*, 60 *Ib.*, 272; *Dawley v. Brown*, 79 *Ib.*, 398—400.

PER CURIAM.—The order should be affirmed, with

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Statement of the Case.

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ten dollars costs, etc., upon the opinion filed by the learned judge of the court below.

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JOHN DOUGLASS, RESPONDENT v. HENRY J.  
MEYER, APPELLANT.

*Order for the examination of defendant as a witness before trial on the part of plaintiff, under sections 870, 871, and 872 of the Code.*

The order appealed from was an order of the special term, denying a motion made by defendant to vacate an order previously made, requiring defendant to submit to an examination as a witness before the trial on the part of the plaintiff, and the questions and facts before the court in the original proceeding are now considered on this appeal.

*Held*, that the order must be affirmed, except that the examination should be limited to the defendant's ownership of the elevator and his relations to the persons who had it in charge at the time of the injury, and the disclosure of the name and address of the physician called by the defendant to attend the plaintiff. The right to such an examination, under the provisions of the Code, is subject to the power of the court to confine the scope of the examination to the legal necessities of the party who seeks it.

Before FREEDMAN, P. J., and McADAM, J.

*Decided October 24, 1892.*

The plaintiff complains that while passing the defendant's place of business, he was struck by an iron bar falling from the elevator lift in front of defendant's store; that the blow rendered the plaintiff unconscious, and he was carried into the defendant's premises and there restored to consciousness by a physician procured by the defendant, and that the plaintiff was thereafter sent home in a cab. Plaintiff sues to recover \$1,000 for his injuries, charging negligence on the part of the defendant and his servants in the management of the lift. The defendant in his answer denies all liability.

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Opinion of the Court, by McADAM, J.

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Upon an affidavit complying with the requirements of the Code, the plaintiff procured an order requiring the defendant to submit to an examination as a witness before trial on the part of the plaintiff. From an order of the special term denying a motion made by the defendant to vacate the order for examination, this appeal is taken.

*James Forrest*, for appellant.

*Edward H. Kissam*, for respondent.

BY THE COURT.—McADAM, J.—The general rules of practice provide that where an examination is required under sections 870, 871 and 872 of the Code, the affidavit shall specify the facts and circumstances which show, in conformity with subdivision 4 of section 872, that the examination of the party is material and necessary (Rule 83). In compliance with this rule, the plaintiff swears he believes “that the defendant knows the name of the physician who attended the plaintiff and the names of the various witnesses who were present at the accident, whom deponent will need to prove the manner of the accident and the injury then received by him, as well as the ownership and management of the elevator lift which caused the injury, and that the plaintiff does not know the name of the physician or of said witnesses.”

While it is true the Code provisions apply to all actions, the right is qualified by the condition that the examination may be had only in cases where the same is “both necessary and material” and where the witness might be compelled to testify to the same facts at the trial. The judge to whom the application is made is to determine the materiality or necessity from the facts stated, and he is to see that the privilege is not abused because the mere circumstance that a party has been examined before trial does not preclude his examination at the trial

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Opinion of the Court, by McADAM, J.

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(Berdell v. Berdell, 27 *Hun*, 24; Misland v. Boynton, 79 *N. Y.*, 630), and the court may, upon all the facts appearing, vacate the order and leave the party to take the examination at the trial, Jenkins v. Putnam, 106 *N. Y.*, 276. Where it appears that the proceeding is experimental, unnecessary, instituted to vex or harass, or for idle or frivolous purposes, the order should be vacated. Sumner v. Hosford, 12 *Week. Dig.*, 440. If the proceeding contemplates a broader line of examination than is necessary and material, "It is for the judges now," said the Court of Appeals, "by rules of practice and by rulings at the examination, to keep the plaintiff within proper bounds, and to ward off from the party all inquiry which is vain or curious." Glenney v. Stedwell, 64 *N. Y.*, 123. In Herbage v. City of Utica, 109 *N. Y.*, 81, an order limiting an examination was reversed, because "the order appealed from was so limited, not according to the discretion of the court, *by which it might have been restrained*, but because, as appeared by the order, the court was of opinion that it had no power to order otherwise." Indeed, section 873 of the Code as amended in 1879, expressly declares that the judge who grants the order, may in his discretion "designate and limit the particular matters as to which the party shall be examined," and whatever discretion the judge below had in the premises, may be exercised by the court at general term, for the appeal is nothing more or less than a continuation of the same proceeding in the same court. Phipps v. Carman, 26 *Hun*, 518. The power was exercised by the general term in Kinsella v. The Second Ave. R. R. Co., 46 *State Rep.*, 251, 19 *N. Y. Suppl.*, 188, in which the court intimates that the granting of unrestricted orders for the examination of parties in negligence cases leads to great and unnecessary consumption of time and hardship to litigants, without commensurate results, and decided to modify the order by limiting the examination within certain specified bounds.

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Opinion of the Court, by MCADAM, J.

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The right to the examination, is subject, therefore, to the power of the court to confine the scope of the examination to the legal necessities of the party who seeks it. We make these observations because the plaintiff seeks to ascertain from the defendant, the names of the various witnesses who were present at the accident, and the authorities hold that where the object of the examination is to enable the moving party to look up witnesses to be used against his opponent, it will not be allowed (*Beach v. Mayor*, 14 *Hun*, 79; *Chapin v. Thompson*, 16 *Ib.*, 53), nor will the examination be permitted to discover the testimony which the adverse party may be able to give in support of his defence. *Fourth Nat. Bank v. Boynton*, 29 *Hun*, 441; *Schepmoes v. Bousson*, 1 *Abb. N. C.*, 481. If these liberties were allowed, every railroad company might be required by parties prosecuting them for negligence to furnish the names of all their witnesses in advance of the trial, a course not sanctioned in the conduct of civil causes.

We think the examination should be limited to the defendant's ownership of the elevator, and his relations to the persons who had it in charge at the time of the injury, followed by the disclosure of the name and address of the physician called by the defendant to attend the plaintiff.

This information, seemingly important, is within the peculiar knowledge of the defendant, is material to the plaintiff's case, the establishment of the facts essential to the recovery sought for, and an examination of the defendant respecting the same substantially a legal right. *Carter v. Good*, 57 *Hun*, 116; *Sweeney v. Sturges*, 24 *Ib.*, 162; *Goldberg v. Roberts*, 12 *Daly*, 339; *S. C.*, 67 *How.*, 269. In *Sweeney v. Sturges*, *supra*, the injury was done by a machine the ownership of which was denied, and the court held that the plaintiff had the right to establish such ownership by the defendant's examination before trial.

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Opinion of the Court, by MCADAM, J.

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In *Goldberg v. Roberts*, *supra*, the copartnership of the defendants was denied, and the court held that the plaintiff was entitled to examine the defendants respecting the same. See also, *Glenney v. Stedwell*, 64 *N. Y.*, 123. Examinations as to such matters are not experimental merely, but in the nature of the discovery formerly allowed in equity (*Glenney v. Stedwell*, *supra*), although the Code provisions are far more than a substitute for the old bill of discovery. *Hynes v. McDermott*, 55 *How.*, 260. The disclosure here sought for is necessary to supply the links in the chain which associate the defendant with the liability charged. The right to examine an adverse party before trial, has frequently been before the courts and has called forth many adjudications upon the subject. This is owing in part to the numerous phases in which the question was presented and the difficulty of applying immutable rules to all cases in which such examinations were claimed. In view of this fact probably the Court of Appeals, in *Jenkins v. Putnam*, 106 *N. Y.*, 276, said: "It is one of those matters of practice which should always be left to the discretion of the court of original jurisdiction, and its decision should not be reviewed here unless it appears from its order that the decision was placed upon some ground of law not involving discretion."

With the modifications suggested the order is right and must be affirmed, but without costs.

FREEDMAN, P. J., concurred.

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Statement of the Case.

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**THE MAYOR, ETC., OF THE CITY OF NEW YORK,  
APPELLANTS v. JAMES M. SMITH, IMPLEADED,  
ETC., ET AL., RESPONDENTS.**

*Vacation of judgment upon the ground that no process had ever been served upon the defendant Smith, and that he never authorized any one to appear for him, etc.*

This is an appeal from an order vacating the judgment as to defendant Smith.

*Held*, that under all the circumstances and facts, and in view of the same as set forth in the opinion of the court, the court below was justified in vacating the judgment unconditionally.

**Before McADAM and GILDERSLEEVE, JJ.**

*Decided October 24, 1892.*

The plaintiffs claim that the action was commenced by the service of a summons on the defendant Smith on July 21, 1868, and on the other defendants on July 24 and 25, 1868.

That all the defendants appeared in the action August 4, 1868, by Frank S. Smith, as attorney. The notice of appearance is entitled in the "Supreme" Court, and is for "the defendants" without naming them. It is dated August 4, 1868. No proceedings seem to have been taken in the action until February, 1890, when the corporation counsel served a notice of application for judgment as by default, which motion he subsequently abandoned. The plaintiffs thereafter and on January 19, 1892, filed with the clerk of this court, a judgment roll as by default, reciting the appearance of all the defendants by attorney, and annexing to the roll the notice of appearance aforesaid, whereupon the clerk

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entered judgment against said defendants for \$9,984.18. No proof of the service of the summons or the complaint was annexed, and no legal proof of the service appears in the appeal book.

The defendant Smith thereupon moved to vacate the judgment as to him, upon the ground that no process had ever been served upon him, that he had no knowledge whatever of the action until the service of the notice of application for judgment in 1890, which was abandoned, and that he had never authorized any one to appear in the action for him.

The court granted the motion and vacated the judgment as to said defendant, and from the order aforesaid, the plaintiffs appeal.

*William H. Clark*, counsel to the corporation, and *John J. Delany* and *Terence Farley* of counsel, for appellants, argued :—

I. Where the judgment recovered is regular between the parties to it, the settled practice of the court is opposed to setting it aside for the mere reason that the appearance was in fact unauthorized. Upon this subject the rule is uniform in courts both of law and equity. *Powers v. Trenor*, 3 *Hun*, 5; *Adams v. Gilbert*, 9 *Wend.*, 499; *Kenyon v. Schreck*, 52 *Ill.*, 382; *Sperry v. Reynolds*, 65 *N. Y.*, 183. In *Sperry v. Reynolds*, *supra*, the court said: "In courts of record which have attorneys it has been held, for reason of convenience and public policy, that a party may be bound by an unauthorized appearance of a responsible attorney. In those courts the attorneys are licensed as such, and are authorized to appear and represent parties in the court. They are, in a certain sense, officers of the courts, and, to a certain extent, are under the control of the courts, which can exercise a coercive power over them; and the courts can, in the action in which an unauthorized appearance has been put in, give a party such

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relief against it as he ought to have. *Denton v. Noyes*, 6 *Johns.*, 296; *Hamilton v. Wright*, 37 *N. Y.*, 502; *Brown v. Nichols*, 42 *Ib.*, 26." Although the attorney appeared without authority, courts of law hold the record conclusive to uphold the validity of the judgment, leaving the defendant to his remedy against the attorney for damages, if solvent, or in equity if insolvent. *Carpentier v. Oakland*, 30 *Cal.*, 439; *Ward v. Barber*, 1 *E. D. Smith*, 423; *Allen v. Stone*, 10 *Barb.*, 551; *Wilson v. Wilson*, 1 *Jac. & W.*, 437; *Wade v. Stanley*, 1 *Ib.*, 654. "The Supreme Court of Pennsylvania have acted on the same principle. In *McCullough v. Guetner*, 1 *Binn*, 214; an attorney undertook to appear for a defendant not summoned, and without any warrant of attorney, and the court held the appearance good. In England, the Court of King's Bench, on the same ground compelled an attorney, who had, through misinformation, undertaken to appear for the defendant, without warrant or direction, to complete his appearance, so as to render the judgment which the plaintiff has taken by default, regular. *Lorymer v. Hollister*, 1 *Stra.*, 693." *Tally v. Reynolds*, 1 *Ark.*, 99; 31 *Am. Dec.*, 737.

II. There being no pretence in the case at bar that Frank S. Smith, or his estate, is insolvent, it was improper for the court below to set aside the proceedings. On this point the attention of the court is called to the case of *Adams v. Gilbert*, 9 *Wend.*, 499, where Chief Justice SAVAGE, in denying a motion to set aside the proceedings on the ground that a general appearance for all the defendants was unauthorized, held that the defendants, although all of them had not been served with process, were bound by the appearance of the attorney "unless they show that he is irresponsible and cannot respond to them in damages." In *Bunton v. Lyford*, 37 *N. H.*, 512, it was held that where a regular attorney appears without authority and answers for the defendant, and judgment is recovered against him, it

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will not be vacated, or execution enjoined by a court of equity, unless the attorney is not of sufficient ability to answer for the damage he has caused, or unless there was collusion between him and the plaintiff. See also, *Smyth v. Balch*, 40 *N.H.*, 363; *Grazebrook v. M'Creddie*, 9 *Wend.*, 437. "Where an attorney has appeared for a defendant without authority, the court will not, unless the attorney is irresponsible, set aside the judgment, but will leave the defendant to his action against the attorney." *Bogardus v. Livingston*, 7 *Abb.*, 429. "Numerous cases might be cited to the same effect, both in our own and the English courts, were it necessary. It is enough that the rule in such cases is well settled, and is still adhered to, both in this state and in England. In the anonymous case in 1 *Salk.* and 6 *Mod.*, the court said: 'If an able and responsible attorney appear for another, without a warrant, and judgment is against him, the judgment shall stand, and the party shall be put to his action against the attorney, but if the attorney be a beggar, or in a suspicious condition, the court will set aside the judgment.' This distinction has been adopted by our courts in this state, and thus by a strange confusion of ideas and principles, the validity of a judgment in such a case has come to depend upon the pecuniary condition of the attorney, instead of the jurisdiction of the court." *Williams v. Van Valkenberg*, 16 *How.* 147; *Stern v. Bentley*, 3 *Ib.*, 333. "When the proceedings are in court and the attorney does an unauthorized act for a party prejudicial to him, the party may have relief against such act if the attorney is irresponsible. The relief is given in the action, and care is taken to preserve the rights of the other innocent party, and as to third persons." *Lett v. McMaster*, 51 *Barb.*, 242. " \* \* \* The remedy of the party is against the attorney, for appearing and acting in his name without authority. Where it appears that the attorney is irresponsible, the court, in order to protect

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the defendant, in case he swears to merits, will let him in to defend, allowing the judgment to stand as security." *Blodget v. Conklin*, 9 *How.*, 444. In *American Ins. Co. v. Oakley*, 9 *Paige*, 499, the chancellor said: "Where the adverse party has acquired rights, or been subjected to costs, by proceedings in the name of a party who afterwards denies the authority of the attorney or solicitor who has thus proceeded, the courts are in the habit of permitting the proceedings to stand, where the solicitor or attorney is a responsible man; and leaving the party injured by such unauthorized proceedings in his name to seek his redress against such solicitor or attorney, by a summary application to the court, or otherwise." *Dundas v. Dutens*, 1 *Ves.*, 196; *Denton v. Noyes*, 6 *Johns.*, 297; *Cox v. Nicholls*, 2 *Yeates' Rep.*, 547; *Ex parte Stuckey*, 2 *Cox's Ca.*, 283. "In the present case there is no pretence that the solicitor \* \* \* is not perfectly able to respond in damages to them if he has acted without authority. It is not necessary, therefore, for the protection of their rights that the proceedings \* \* \* should be set aside as unauthorized. \* \* \*" The reason of this rule is apparent, and it has been concisely stated by Judge WOODRUFF, as follows: "And if it be asked, why should the party for whom he appears be left to seek his remedy against the attorney?—why should not the party who has been subjected to an unauthorized litigation pursue that remedy, rather than cast that hazard and burden on one who has done nothing to deserve it?—the answer lies in the suggestion already made, that the law warrants a party in giving faith and confidence to one who, by law, is authorized to hold himself out as a public officer, clothed with power to represent others in the courts. And, besides this, the consequences of the contrary rule would often be altogether disastrous. Evidence would be lost; witnesses die; the Statute of the Limitations bar claims; and death of parties themselves

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might often happen. In various ways, to set aside proceedings at the end of a protracted litigation would be to work inevitable wrong to the party who had relied upon an appearance." *Hamilton v. Wright*, 37 *N. Y.*, 504; *Brown v. Nichols*, 42 *Ib.*, 26.

III. The motion below should have been denied on the further ground that the defendant Smith does not swear that he has any defence to the action. In *Bogardus v. Livingston*, 7 *Abb.*, 429, the court said: "If the defendant, however, swears to merits, the court will allow him to come in and defend, suffering the judgment to stand that the plaintiff's lien, acquired by the judgment, may be preserved." Judge WELLS, in the case of *Blodget v. Conklin*, 9 *How.*, 444, also states that the defendant will be allowed to come in and defend providing he swears to merits, and all the authorities seem to be uniform in holding that where the defendant does not profess to have any defence to the action, even where the attorney appears without authority from him, he will not be allowed to come in and defend, but is relegated to his action against the attorney by whose conduct he has suffered damage. "When the defendant makes affidavit that he never employed the attorney, and no process has ever been served on him, if he can show that he had a good and legal defence to the action, of which he might have availed himself if he had been served, he has a right in equity, at least, to interpose that defence." *Walworth v. Henderson*, 9 *La. An.*, 339; *Weeks on Attorneys*, 371. Judge RUMSEY, in his work on Practice (Vol. 1, p. 196), lays down the rule that "in motions in which the defendant asks for a favor at the hands of the court, or in which the discretion of the court is invoked, it is necessary that he make an affidavit of merits." In *Vanderbilt v. Schreyer*, 81 *N. Y.*, 648, it is said that whether the power of the courts to set aside judgments "shall be exercised in any case rests in its discretion," thereby plainly implying

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that an application of this character is purely discretionary.

IV. It was improper for the court below to decide the conflicting questions of fact on mere affidavits, and the disputed question should have been sent to a referee for determination. This is the course pointed out by the Court of Appeals in *Vilas v. The Plattsburgh and Montreal Railroad Co.*, 123 *N. Y.*, 440, where, in an application similar to the one at bar, Judge ANDREWS says: "If the facts are controverted, and the court is not satisfied upon the affidavits and papers presented as to what the real facts are, it may refer the matter for the purpose of taking further evidence, and may require the parties to submit to an oral examination or cross-examination, *Code Civ. Pro.*, § 1015." It is apparent in this case that there is grave question as to whether or not the defendant Smith was served with process. Where material questions of fact arise, in reference to which the evidence is conflicting, a party seeking relief should be left to an action, provided it can be obtained in that form, rather than determine the question on motion and *ex parte* affidavits. *Hill v. Hermans*, 59 *N. Y.*, 396. Discharge of a judgment will not be ordered on conflicting affidavits without a reference. *Williams v. Irving*, 1 *Hun*, 720.

V. In setting aside judgments obtained through the unauthorized appearance of an attorney, the courts have always protected the innocent party, and it was erroneous for the court below to leave the plaintiffs absolutely without redress. It is confidently asserted that in no reported case in this State has the court acted so arbitrarily as in the case at bar. The plaintiffs' judgment has been set aside, and an adjudication has been made that the defendant Smith, as a matter of fact, was never served with process. This has the effect of depriving the city of all redress, as another action against the defendant Smith would be barred by the Statute of Limitations.

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VI. In actions affecting public interests, such interests will not be allowed to be prejudiced by mere delay in their assertion. In *Brooks v. The Mayor*, 12 *Abb. N. C.*, 350, Judge LAWRENCE, in his opinion, quoted from the case of *Lunny v. The Mayor*, 14 *Weekly Digest*, 140, as follows: "It is true that great delay has intervened between the service of the answer and the application for leave to make the amendment to it now proposed, and in actions against an individual or a private corporation that delay would present a very serious obstacle in the way of the success of the application itself. But in an action affecting public interests which ordinarily do not stimulate that degree of earnest zeal and activity which is aroused in individuals affected by legal proceedings, the same considerations cannot be rigidly applied. It therefore becomes the duty of the court, as well as of the officials themselves, to see that no substantial injustice shall be permitted. *Seaver v. Mayor*, 7 *Hun*, 331. The public interests are not to be allowed to be prejudiced by delays of this nature." In *Greer v. The Mayor*, 1 *Abb. N. S.*, 206, the court said: "The measure of neglect which is applied to cases against individuals for their own acts or neglect, for which they are themselves responsible, ought not to be applied to public functionaries representing parties who are made liable for acts or omissions of which they are ignorant. The principle of the maxim, *Nullum tempus occurrit regi*, in a modified form is applicable to such a case, namely, that the community or its representatives cannot always be supposed to be aware of an unjust invasion of its rights." See also *Broom's Legal Maxims*, \*62. In *Seaver v. The Mayor*, *supra*, the plaintiff was nonsuited at circuit. The judgment was affirmed by the general term but reversed by the Court of Appeals and a new trial ordered. After this reversal, the defendant moved to amend its answer which motion was denied by the special term. Upon appeal, the order of the special

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term was reversed, the court saying: "Public interests, unfortunately, are not as sedulously guarded or as thoroughly protected as those affecting individuals, and the most stringent rules of practice cannot for that reason be applied to litigation involving them; more lenity is required concerning them, for the purpose of avoiding the proper enhancement of public burthens by the allowance of demands having no just foundation."

*William H. Newman*, for respondents, argued:—

I. If the notice of appearance as served had been in the Superior Court it was an unauthorized appearance and void. There is no manner of doubt now, under the decisions in this State, that where no process was served on the defendant, an unauthorized appearance will be set aside and all proceedings vacated on a direct application made in the action. In *Burton v. Sherman*, 20 *Weekly Digest*, 419, it was held that there was no distinction between an unauthorized appearance and a forged notice of appearance, no jurisdiction being had in either case; and all proceedings based on the unauthorized appearance was vacated. The responsibility of the attorney was declared unimportant, as the court acquired no jurisdiction. In no reported case that has come to our knowledge has redress been refused to a defendant attempted to be held by an unauthorized appearance where no process was served upon him where a direct application was made in the action itself. In all cases where relief has been refused it was sought collaterally. A brief reference to cases will sustain my contention. In *Hamilton v. Wright*, 37 *N. Y.*, 505, relief was refused, upon the ground that the attorney was properly authorized to bring the action by the grantee in the name of the grantors under § 111 of the Code, to oust a party in possession, and is distinguishable from the case at bar. In *Brown v. Nichols*, 42 *N. Y.*, 26, the court held that a judgment against a party not served with process, but

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for whom an attorney appeared without authority, cannot be raised collaterally. The court points out the remedy. Judge EARL, delivering the opinion, says: "I think a party should always seek relief for an unauthorized appearance in the suit in which it has been put in." Judge INGALLS concurring, says: "If a party will omit to apply to the court for relief against an unauthorized appearance of an attorney, he should not be allowed to attack proceedings collaterally upon such ground." In *Sperry v. Reynolds*, 65 *N. Y.*, 186, The rule is stated by DWIGHT, Justice, as follows: "the rule of law in this State is that a judgment recovered in a court of record cannot be attacked collaterally upon the ground of want of service or the unauthorized appearance of an attorney." In *Ferguson v. Crawford*, 70 *N. Y.*, 254, there is a most elaborate opinion delivered by Judge RAPALLO, in which he examines many of the preceding cases, and in which a different rule than that in *Sperry v. Reynolds*, *supra*, was enunciated, viz.: that where process was not served the appearance of an unauthorized attorney gave the court no jurisdiction over the defendant, and he could set it up collaterally in another action to enforce the judgment against him. The court further says, it is no good answer to say that the party injured has his remedy against the attorney who appeared without authority; that in most instances it would be a barren remedy. (It is especially so in the case at bar as the attorney long since deceased.)

II. The plaintiff will probably rely on the case of *Denton v. Noyes*, 6 *Johns.*, 296, which holds that where no process was served and an unauthorized appearance was put in, the judgment would not be set aside, but the defendant must seek his remedy against the attorney unless he was irresponsible. The court relied upon some early English cases for this doctrine, and the dissenting opinion of Van Ness seems to be nearer the present rule as laid down in more recent cases. The English cases

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relied upon in *Denton v. Noyes*, were reversed in *Bagley v. Buckland*, 1 *Exch.*, 1. It is submitted that the rule in *Denton v. Noyes* should not be followed for the reason that the cases on which it was based have been overruled by the latter English cases ; that it is contrary to natural justice and to the common law of England at the present time, and because it has never been followed in a single reported case in this State, and although not in terms overruled, the doctrine therein enunciated has never been applied here ; but all cases of similar character have been distinguished, and the relief sought has been uniformly granted as a reference to the cases cited will demonstrate. Even in the case of *Denton v. Noyes*, while the court lay down the harsh doctrine that has been before alluded to, so far modified it as to grant the very relief that was sought. The rule in *Denton v. Noyes* has been sharply criticised in a great number of recent cases which have been distinguished from that case. It is not the rule in this State as the following case will show. *Allan v. Stone*, 10 *Barb.*, 547 ; *Williams v. Van Valkenburg*, 16 *Hun*, 144.

III. The relief granted at special term was proper ; the notice of appearance was a nullity in this action. There was no service of summons, so the court never got jurisdiction over this defendant. If the notice of appearance had been served in this action it was a nullity because it was unauthorized. The law laid down in *Burton v. Sherman*, *supra*, puts an unauthorized notice of appearance on the same basis as a forged notice of appearance ; jurisdiction is not acquired in either case. This defendant was never before the court until he came in specially to move to set aside the alleged appearance. The court never obtained jurisdiction of this defendant. It can acquire jurisdiction over him only in the way prescribed by law, viz.: by service of summons on him, or by a voluntary appearance. The order made at special term was a legal right.

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BY THE COURT.—McADAM, J.—The plaintiffs are certainly guilty of great laches in allowing an action commenced in 1868 to slumber twenty-four years, when according to their theory they were entitled to take judgment as by default for want of an answer in December, 1868. The defendant was sued as surety on a lease made to one Allerton, who, at the time the plaintiffs claim they were entitled to judgment, owned real estate and was solvent. He is now irresponsible. Under such circumstances the defendant cannot be censured by being seemingly technical as to plaintiffs' practice in regard to the manner and form in which their judgment was entered. The court below, in disposing of the motion, inferentially found that the defendant was never served with process; that the appearance interposed for him was without authority; that he had no knowledge of the action until February, 1890, when the plaintiffs served the notice of motion for judgment which they afterwards countermanded; and that he was out of the jurisdiction of the court during all of July and August, 1868.

On these facts one would naturally suppose that the fundamental rule applied—that to render a judgment of a court effectual as one *in personam*, it is necessary that the parties interested be subjected to the process of the court by personal service; that the fiction that an appearance is equivalent to such service applied only to cases wherein the appearance was authorized, and that there can be no such authority unless the relation of attorney and client actually subsists; that the suitor had the right to select his own attorney; that the relation cannot be created by the attorney alone, and that the court in which a judgment was entered must, in a direct proceeding for the purpose, relieve the defendant unconditionally from a judgment entered wholly on an appearance by an unauthorized attorney; but these principles apply only to foreign and not to domestic

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judgments. *Ferguson v. Crawford*, 70 *N. Y.* 257; *Kerr v. Kerr*, 41 *Ib.*, 272; *Hoffman v. Hoffman*, 46 *Ib.*, 30. The reason for the distinction seems to be that it would be unreasonable to require the defendant to go to the court of the foreign state which rendered it, and attack it directly by a bill or motion; hence he is permitted to plead the want of authority in the attorney, defensively and collaterally; whereas, in the case of a domestic judgment, it is deemed better to force the party to assail it directly in the jurisdiction of his domicile (thus giving the court an equitable control over the proceedings) by precluding him from resorting to the plea of want of authority in the attorney, collaterally as a defence to a *scire facias*, or direct action on the judgment. *Wells on Attorneys*, p. 358. Hence a domestic judgment rendered against a resident, by a court of general jurisdiction against a party who has not been served with process, but for whom an attorney of the court has appeared, though without authority, is neither void nor irregular. *Denton v. Noyes*, 6 *Johns.*, 296, followed as authority in *Vilas v. P. & M. R. R. Co.*, 123 *N. Y.*, 453; and see *Powers v. Trenor*, 3 *Hun*, 3; *Adams v. Gilbert*, 9 *Wend.*, 499; *Sperry v. Reynolds*, 65 *N. Y.*, 183; *Leet v. McMaster*, 51 *Barb.*, 242, and kindred cases. Still a party is entitled to relief when an unjust judgment though a domestic one has been rendered against him by fraud or collusion, or by the appearance of an unauthorized attorney, if the party seeks the relief by bill or motion promptly (*Wells on Attorneys*, p. 359), but unless special circumstances necessitate a resort to a court of equity, relief by motion in the action in which the unauthorized appearance was entered is proper. *Vilas v. P. & M. R. R. Co.*, *supra*. The practice warrants a party in giving faith and confidence to one who, by law, is authorized to hold himself out as a public officer, clothed with power to represent others in court; and when an attorney appears for a

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party his appearance is recognized and his authority will be presumed to the extent at least of giving validity to the proceeding (*Ferguson v. Crawford, supra*; *Hamilton v. Wright*, 37 *N. Y.*, 504; *Brown v. Nichols*, 42 *Ib.*, 26,) which is the reason why an appearance by an attorney, without warrant, is good as to the court. *Denton v. Noyes, supra*. It is the official position of the attorney as an accredited officer of the court, that gives rise to the implication that he possesses the authority he assumes to exercise, for in ordinary cases the presumption does not attach, and where one is sought to be bound by the act of another who assumed to act as his agent, the party seeking to hold him bound by such act must show the agency. The object of the direct proceeding to the court which rendered the judgment is to enable it to give the relief necessary, without doing injustice to the plaintiff or to innocent third persons who may have acquired rights under the judgment.

Whether the judgment ought to be vacated entirely or allowed to stand as security with permission to the defendant to come in and defend, is a question addressed to the discretion of the court in which the judgment was recovered, to be exercised upon equitable principles in furtherance of justice according to the peculiar circumstances of each case; for, as the Court of Appeals in *Sperry v. Reynolds*, 65 *N. Y.*, 182, said, "the courts can, in the action in which the unauthorized appearance has been put in, give a party such relief against it as he ought to have." In *Ferguson v. Crawford, supra*, it was held that while an unauthorized appearance would bind the defendant, he was not precluded from showing that the paper was a forgery. In *Burton v. Sherman*, 20 *Week. Dig.*, 419, the court held, that there was no distinction between a forged notice of appearance and an appearance by an attorney not authorized to give it, as the notice in neither case reaches the party. This case is not in harmony, however, with the controlling authorities upon the subject.

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In *Vilas v. P. & M. R. R. Co.*, *supra*, the rule in regard to judgments entered on unauthorized appearances was re-affirmed, but the case distinguished from those concerning domestic judgments, because the defendant was a resident of another State and not within the jurisdiction of the court, and it was held that the rule relating to foreign judgments applied to one so situated, and that the court below ought to have vacated the judgment. See also *Nordlinger v. De Mier*, 54 *Hun.*, 276. The defendant here was out of the jurisdiction of the court at the time of the unauthorized appearance, but being a resident of the city of New York, the exception in favor of non-residents of the State does not apply. In some cases the courts have denied all relief in cases of domestic judgments, leaving the injured party to seek his remedy against the attorney (where he appeared to be a responsible person) either by summary application or action. *American Ins. Co. v. Oakley*, 9 *Paige*, 499, and kindred authorities. The attorney who appeared for the defendant is dead, and it is not shown whether he left any estate to which the defendant may resort, and it is more than likely he will find no productive remedy in that direction. Denying a defendant injured by an unauthorized appearance any relief in the action, compelling him to pay a judgment of which he knew nothing until an execution was presented for its collection, and then leaving him to the uncertain remedy of a suit against the attorney who assumed to act for him, seemed so inequitable, that, in *Ellsworth v. Campbell*, 31 *Barb.*, 134, it was held that the injured party should not be confined to his remedy against the attorney, even though the latter be responsible, and that the court should, in any case of unauthorized appearance, give the injured party leave to come in and litigate the case on the merits, preserving meanwhile the lien of the judgment. In *Blodget v. Conklin*, 9 *How.*, 444, it appeared that the attorney was irresponsible, and the court, to

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protect the defendant, permitted him to come in on swearing to merits, and allowed the judgment to stand as security. In *Denton v. Noyes*, *supra*, the relief afforded was to stay proceedings on the judgment and allow the defendant to come in and defend the action. In these cases there were no laches on the part of the judgment creditor—here, we have judgment creditors who have slept on their rights for twenty-four years without a move on their part—the lips of the attorney who appeared are sealed in death, and Allerton, for whom the defendant became surety, has become insolvent. Under these circumstances, the terms imposed in the cases cited would not reinstate the defendant to the position he occupied when the unauthorized appearance was given. The authorities all concede that the court has power in any case to award proper relief to a defendant against an unauthorized appearance ; they differ only as to the extent of the relief which ought to be granted. None of the cases deny the power of the court to set aside the judgment altogether where that extreme course would not be inequitable to the plaintiff nor infringe on the rights of others. The defendant knowing nothing to the contrary had the right to assume that the obligation for which he was surety had been discharged by payment, or had ceased to be enforceable by reason of the statute of limitations. The liability is to be continued, if at all, by force of the unauthorized appearance by an attorney given twenty-four years ago, and never acted upon until recently. This requires us to examine the notice of appearance critically, and to construe it more strictly against the plaintiffs than we might have done but for this unusual delay. The appearance is in an action in the “Supreme” Court, while the present litigation is in the “Superior” Court. Such an error might in many instances constitute a mere irregularity, waived by retaining the paper. Such was the construction put upon an answer entitled “Supreme” instead of

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“Superior ” Court (Williams v. Sholto, 4 *Sandf.*, 641), but the plaintiff in that case did not depend upon the answer for the court’s jurisdiction to act—that had been acquired by the personal service of process—for that reason the case is distinguishable from this. In the present instance the jurisdiction of the court is made to depend exclusively on the appearance of the attorney, and if this did not authorize the Superior Court to act upon it, the judgment entered is not only without authority but void. In a jurisdictional aspect the title of the court became an essential and inseparable part of the notice, as much so apparently as the name of a bank on a check or a particular individual as drawee on a draft. The creditor could not in such a case treat the instrument at his option as drawn upon another institution or individual. If the defendant sued the estate of his attorney, he would have to overcome this objection, and the question is whether such a notice of appearance, not followed by the service of a complaint “as demanded by the terms of the notice,” or of any other papers entitled in the “Superior ” Court (and there is no such proof in the appeal book), would make the estate liable for the Superior Court judgment. Indeed, nothing whatever was done by the plaintiffs in recognition of the notice as an appearance in this action, and the fact that the complaint demanded by the notice was not served rather indicates that the plaintiffs’ counsel elected to treat the notice as a nullity. Section 130 of the Code, in force when the appearance was given, provides that “a copy of the complaint need not be served with the summons. In such a case the summons must state where the complaint is or will be filed; and if the defendant, within twenty days thereafter, causes notice of appearance to be given, and in person or by attorney demands in writing a copy of the complaint, specifying a place within the state where it may be served, a copy thereof must, within twenty days thereafter, be served

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accordingly, and after such service the defendant has twenty days to answer, but only one copy need be served upon the same attorney." The appeal book fails to show by any legal evidence that the complaint was ever served, so as to start the time when the twenty days within which an answer might be served commenced to run. This departure from practice would make the judgment irregular, even if the notice of appearance conferred jurisdiction, and if it did not proof of service of the summons was required before the clerk was authorized to enter judgment. *Old Code*, § 246; *New Code*, § 1212. It seems to us, in view of the facts, that the notice of appearance either binds the defendant in the form in which it was used, or it is not binding on him at all, and that it cannot be altered or enlarged by any act of the creditor to which he did not assent, in the absence of some authority or ratification on the part of the person to be charged. An appearance entitled in the "N. Y. Supreme Court" would hardly be held to confer jurisdiction on the "Superior Court of Cook Co., Illinois," nor *vice versa*, yet there is no substantial difference between the illustration put and the case at bar. If such a holding were sustained orderly practice would be disregarded and confusion, worse confounded, welcomed in its place.

In *M. & M. Bk. v. Boyd*, 3 *Den.*, 257, it was held, that a warrant to confess judgment executed by residents of Pennsylvania, which by a fair construction of its terms contemplated a judgment in a court in that state, will not uphold a judgment entered in this state.

The warrant in that case, like the notice in this, was the sole thing upon which jurisdiction depended, and where it contemplated proceedings in one court, they were deemed unauthorized in another.

If the rights of third parties had intervened, there might be some justification in attempting to uphold the judgment leaving the defendant to whatever remedy

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there might be against the attorney or his estate, but no such rights have accrued.

If there had been no laches on the part of the plaintiffs or even a reasonable delay, there might perhaps be some reason for permitting the judgment to stand and allowing the defendant to come in and defend on proving merits as was done in the three cases cited.

But the plaintiffs of their own volition waited until twenty-four years had passed, until the attorney who appeared in the action had passed to his final home, and then *ex parte*, and on defective proofs entered their judgment.

When informed of the status of the case by the notice of motion in February, 1890, the defendant sent one Newman to the corporation counsel, and told him that the defendant could not be the James M. Smith intended, the notice of motion was withdrawn, and a promise given that nothing further would be done without notice. No notice was given, until the defendant was informed of the judgment, and he took prompt measures to have it vacated by direct proceedings in the action. If, under such circumstances, the plaintiffs are in any manner aggrieved, by reason of the running of the statute of limitations or otherwise, it is the result of inexcusable laches on their part, which cannot be charged to the defendant. In view of all the facts, the long delay on the part of the plaintiffs, the changed financial condition of the principal debtor for whom the defendant was merely surety, the circumstance that the notice of appearance is in an action in the "Supreme Court," with the want of authority in the attorney to appear at all, and for the irregularities in practice specified, we think the court below was justified in vacating the judgment unconditionally. There was no absence of power—no abuse of discretion.

The order appealed from must, therefore, be affirmed, with costs.

GILDERSLEEVE, J., concurred.

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Statement of the Case.

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**EDWARD CORRIGAN, RESPONDENT v. THE CONEY ISLAND JOCKEY CLUB, APPELLANT.**

*Mandatory injunction—Sale of a race-horse with all his racing engagements, and sale of same on a statement that he was “eligible” for certain races considered.*

The contention of the plaintiff in this case was that the colt “Huron” was sold “*with all his racing engagements,*” among which was “The Futurity,” and by means of such purchase of the colt, he became entitled to run the said colt in “The Futurity” race on August 29, 1891. At the time of the sale the colt was eligible as a competitor for “The Futurity.” In the catalogue of sale the colt was described as “Eligible to Coney Island Futurity, 1891.”

Upon the verified complaint in the action the special term granted a mandatory injunction directing the defendant to permit a certain horse known as “Huron,” the property of the plaintiff, to take part in a race called “The Futurity,” on the 29th day of August, 1891. From the order granting the same this appeal is made.

*Held*, that the sale of the colt as “Eligible to Coney Island Futurity, 1891” in the description of the colt “Huron,” when read in with the conditions of the sale, did not operate as a declaration by the vendor that the colt was sold with his racing engagements, and that representation of eligibility, can hardly be held as one of the conditions of sale, and certainly it would be unreasonable to make the further claim that this description meant a sale of the colt, with all his engagements. If, however, under the facts and circumstances, it may be assumed that the plaintiff did purchase the colt “Huron” with his engagements, and succeeded to all the rights of General Jackson, the vendor, in respect to the colt and “The Futurity” race, and there was a question whether the plaintiff had or had not a right to run the said colt in the Futurity race of 1891, the executive committee of defendant, were the final arbiters, and that committee decided that the said colt was not eligible to start in “The Futurity race of 1891” and that decision this court will not overturn. Executive committees of jockey clubs and social clubs, are supreme within themselves, when acting within the scope of their recognized legal authority, and the courts will not interfere with their decisions when rendered in accordance with their powers and rights. The statutes of this State give the defendant the right to conduct races at certain specified times, and the right to settle controversies, like the one in question, is just as firmly established, and it has the support of sound principles of

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equity, declared in a long line of authorities. The executive committee of the corporation-defendant were fully warranted in the decision reached and in the course pursued.

Before FREEDMAN, P.J., DUGRO and GILDERSLEEVE, JJ.

*Decided October 24, 1892.*

Appeal from an order of the special term, granting a mandatory injunction directing the defendant to permit a certain horse known as "Huron", the property of the plaintiff, to take part in a race called "The Futurity," on the 29th day of August, 1891.

*Platt & Bowers*, attorneys, and *John M. Bowers* of counsel, for appellant.

*Howe & Hummel*, attorneys, and *A. H. Hummel* of counsel, for respondent.

BY THE COURT.—GILDERSLEEVE, J.—The defendant, the Coney Island Jockey Club, is a corporation existing under the laws of the State of New York, owning what is known as the Coney Island race track, and is engaged in the business of running thoroughbred horses over its course at said track for stakes and purses.

Among the stake races, arranged by the defendant, is a race known as "The Futurity." The entries of contestants for this race are made before the contesting horses are born. The owner of a mare in foal enters the unborn foal of such mare, to be run at the age of two years.

In the year 1888, pursuant to the provisions and conditions of said race, one General Jackson, the owner of "Belle Meade Stud Farm," of Nashville, Tennessee, entered for the said race the unborn foal of a certain thoroughbred mare, known as "Brunette," by the thoroughbred running horse "Iroquois." This foal

was born in the spring of 1889, and was named "Huron."

The plaintiff is engaged in the business of breeding, purchasing and running horses for purses and stakes; and, on the 24th day of April, 1890, purchased the said colt "Huron" at public auction.

It is manifest that if the plaintiff has a cause of action here against the defendant, it has its basis in the rights that he acquired by the purchase of the said colt "Huron." Our first inquiry, therefore, is: What rights in respect of "The Futurity" race did the plaintiff get by his said purchase?

It is the contention of the plaintiff that the colt "Huron" was sold "with all of his racing engagements," among which was "The Futurity;" and that by means of this purchase of the colt he became entitled to run the said colt in "The Futurity" race on August 29, 1891. It must be conceded that, at the time of the sale, in April, 1890, the said colt was eligible as a competitor for "The Futurity." In the catalogue of sale, he was described as "Eligible to Coney Island Futurity, 1891." We do not understand that any claim is made to the contrary.

We agree with the learned court below that this announcement of the colt's eligibility in respect to "The Futurity" race meant that he was "legally qualified to enter into it." The question to be met, however, is this: Was he sold with this engagement?

This right or privilege, called an engagement, had its origin in a contract entered into between General Jackson, the owner of "Belle Meade Stud Farm," and the defendant; and it cannot be enforced, except in pursuance of the terms and conditions of that contract. If, by the purchase, the plaintiff became the owner of the colt's engagements, and succeeded to the rights of General Jackson, he, in his efforts to enforce those rights, must submit to the rules of the defendant, under

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and subject to which the contract was originally made.

Rule 61 of defendant provides that when the horse is sold at public auction, the advertised conditions of the sale are sufficient evidence that he was sold with his engagements. As we read the catalogue of the sale, we do not understand the words "Eligible to Coney Island Futurity, 1891, Brood Mare, Sweep Stakes, Westside Park, Nashville, 1891," as constituting one of the conditions of the sale. It was a portion of the description of the colt, and a statement of the possibilities that a purchaser might realize. The conditions of the sale, as published in the catalogue, were set forth in five paragraphs, numbered respectively from first to fifth, and contain no reference whatever to the engagements of the colt "Huron" or any other horse. In the conditions of sale, no engagements are specified, as provided for by "Section 61, rules of racing, regulations of the course and betting rules," adopted by the defendant, and in force at the time the contract under consideration was entered into between General Jackson and the defendant. We fail to find any evidence in the record to support the conclusion that the colt "Huron" was sold with his engagements.

We cannot agree with the learned court below that the statement "Eligible to Coney Island Futurity, 1891," in the description of the colt "Huron," can be read in with the conditions of the sale and operate as a declaration by the vendor that the colt "Huron" was sold with his engagements. We think that it cannot even be said that a representation as to the eligibility to the Futurity race was one of the conditions of sale. Could it be given an interpretation so elastic, it would certainly be unreasonable to make the further claim that this description meant a sale of the colt with his engagements.

Had it been the intention of General Jackson that the

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sale of the horses in question should be with their engagements, it was a condition so easily expressed that we are justified in assuming that it would have been set forth in the catalogue with perfect clearness. The engagements of a race-horse constitute an important factor with purchasers in placing an estimate upon his value, and is a feature of the business that receives important, and not slight, consideration. Again, the owner of the "Belle Meade Stud Farm" had good reasons for not selling his horses at public auction with their engagements. The sale was a large one. If the horses were sold with their engagements, he, General Jackson, remained liable for forfeits which would amount to a large sum, and would entail much trouble and possibly great loss. Purchasers, having bought horses eligible for certain races, could readily, by private treaty with the vendor, in accordance with the rules adopted by the defendant and other racing associations, secure all rights to engagements which the vendor had.

The letter of May 4, 1890, to the secretary of the defendant by Mr. Carter, General Jackson's agent, declaring the colt "Huron" out of "The Futurity" for 1891, supports, with much force, the contention of the defendant that the colt was not sold with his engagements. If he was sold with his engagements, then the vendor, a few days after having made the sale, assumed authority over the engagement, with which he had just parted,—a very unreasonable and improbable act for the proprietor of such a large establishment as "Belle Meade Stud Farm."

Furthermore, the letter of May 11, 1891, by Mr. Kuhl to the secretary of the defendant, and the telegram of May 16, 1891, to the secretary of the defendant from the plaintiff, indicate very clearly that if the plaintiff did buy the colt "Huron" with his engagements, he did not know it. If credit is to be given to Mr. Carter's affidavit, we have direct proof that "The Futurity" en-

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gagement of the colt "Huron" was the subject of negotiations between the vendor and plaintiff, and resulted in the plaintiff's declining to assume the engagement.

If, however, the plaintiff did purchase the colt "Huron" with his engagements, and succeeded to all the rights of General Jackson in respect to the colt and the "Futurity" race, and there was a question whether the plaintiff had or had not a right to run the said colt in the "Futurity" race of 1891, the executive committee of the defendant were the final arbiters. The executive committee of the defendant-corporation decided that the said colt "Huron" was not eligible to start in the "Futurity" race of 1891, and that decision this court will not overturn.

One of the rules in force when the original contract was made, knowledge of which the vendor of the said colt will be presumed to have had, is as follows: "If any case occur, which is not, or which is alleged not to be, provided for by these rules, it shall be determined by the executive committee, in such manner as they think best and conformable with the usage of the turf."

The executive committee of the defendant-corporation in denying the right of the plaintiff to run the said colt "Huron" in said race, so far as appears, acted in good faith and had sufficient evidence before them to sustain their conclusion.

Courts of equity rarely interfere with the exercise of discretionary powers by corporate bodies or their officers, to whom such powers are confided. Where acts requiring the exercise of judgment, science or professional skill are confided to the discretion of the officers of a corporation, the exercise of that discretion will not be lightly disturbed; nor will such officers be enjoined, except when abusing their power to the injury of others. See *Walker v. Mad. Riv. Co.*, 8 *Ohio*, 38; *Cooper v. Williams*, 4 *Ib.*, 253; *High on Injunctions*, § 763.

Executive committees of jockey clubs and social clubs

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are supreme within themselves, when within the scope of their recognized authority ; and where there is any evidence, and the party concerned has an opportunity to be heard, in the absence of fraud, courts should not interfere with their decisions.

When the original contract was entered into, which secured to the owner of the colt "Huron" whatever rights existed in respect to the "Futurity" race, the owner of the said colt, in effect, subscribed to the defendant's rules, and they are binding upon his successor. Those rules named the tribunal to which any dispute, that might arise out of the contract, should be submitted. That tribunal was the executive committee of the defendant-corporation. They had jurisdiction of the cause of action alleged in the complaint herein, and it was the duty of the plaintiff to submit to their decision.

The statute laws of this State give the defendant the right to conduct races at certain specified times. The right to settle controversies, like the one in question, is just as firmly established, though it rests upon a different foundation. It has the support of sound principles of equity, declared in a long line of authorities.

The plaintiff, having rested quietly for over a year and after hundreds had acted upon the situation as it then existed, came forward at the last moment, and demanded an entrance for his horse. His demands could not have been granted, without doing great injustice to other competitors and to patrons of the turf generally.

We are of the opinion that the executive committee of the defendant-corporation were fully warranted in the course that they pursued.

The order appealed from should be reversed, and the injunction dissolved, with costs and disbursements to the defendant.

FREEDMAN, P. J., and DUGRO, J., concurred.

Appellant's points.

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THE GERMAN SAVINGS BANK, IN THE CITY  
OF NEW YORK, APPELLANT v. EMANUEL M.  
FRIEND, ET AL., RESPONDENTS.

*Action for interpleader and injunction.*

*Held*, that the plaintiff is not entitled to an interpleader, and, therefore, no right to the injunction sought existed, and the motion for an injunction was properly denied.

Before FREEDMAN, P. J., and GILDERSLEEVE, J.

*Decided October 24, 1892.*

Appeal from order of special term denying motion for an injunction. The points and facts in the case appear fully from the opinion of the court.

*Sanders, Wagner & Auerbach*, attorneys, and *Lewis Sanders* of counsel, for appellant, argued:—

I. Since the plaintiff offered to pay the money into court and could have been required to give security for a stay, the action should not be determined against it on the merits before a trial if plaintiff presented a *prima facie* case, and showed that defendants were doing something which tended to defeat the judgment prayed for. Code, § 604.

II. The learned judge below cites 123 *N. Y.*, 396, as an authority for the denial of this motion. A reference to the case cited, *Bassett v. Leslie*, will tend to elucidate the question. *Authority*: “This, under the old chancery practice, could have been called a strict bill of interpleader, and to maintain such an action it is necessary to allege and to show that two or more persons have preferred a claim against the plaintiff.” *The complaint*

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Appellant's points.

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alleges that the defendants, Friend and House and Guttman and Podrasky, have each preferred a separate claim against plaintiff. The facts are shown by affidavit and not controverted. *Authority*: "That they claim the same thing, whether a debt or duty." *Complaint*: "That the defendants severally claim the deposit by Guttman of \$180." *Authority*: "That the plaintiff has no beneficial interest in the thing claimed, and that it cannot be determined without hazard to itself, to which of the two defendants the money or thing belongs." *Complaint*: "The plaintiff is ignorant of the rights of the parties, and does not know to whom to pay it; it has no interest in the fund, and is advised by its counsel that it cannot safely pay to either of the defendants." *Authority*: "There must also be an offer to bring the money into court." *Complaint*: "And that the plaintiff upon the payment of the sum of \$180 into court be hence discharged," etc. It would seem to be somewhat difficult to draw a complaint more directly in conformity with the authority cited by the court below, as controlling against the plaintiff. A bill of interpleader will lie if it involve either difficult questions of law or doubtful questions of fact. *Crane v. McDonald*, 118 N. Y., 649.

III. There is no contract relation between plaintiff and defendants, Friend & House. The defendants assume the unwarranted position that because Guttman was a depositor with plaintiff, that his alleged assignors occupy the same position. This is manifestly an error. Plaintiff has never agreed to pay Friend & House anything, and by assignment they do not become depositors. They cannot draw the money on their order but by virtue of the assignment, if at all. Guttman was still a claimant at the time of the bringing of the action. His denial on the hearing of the motion might work an estoppel against him from that date, but could not defeat the right of action already accrued. The officer of the bank, perfectly disinterested and unimpeached, alleges a

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Respondents' points.

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demand by Guttman subsequent to his alleged assignment to Friend & House. This court will not disbelieve his statement against the unsupported denial of a man held for theft by the police magistrate. Nor will it deny the plaintiff the right to try the merits of the case.

IV. Interpleader by motion is merely cumulative, and cannot be had when to grant the motion would introduce another controversy. Podrasky claims the money as his against both Guttman and Friend & House, not deriving title, through either. Friend & House claim under Guttman and adversely to Podrasky, while Guttman claimed against both. In such case an interpleader by motion will not lie. "Here is not only a contest between the plaintiff and the widow and these two claimants themselves, which must be litigated before the rights of all the parties can be fully determined. As, for instance, if the administrator is held to have a superior right to the widow, he is still subject to a litigation between himself and the assignee to determine whether the assignee is not entitled to the sum he claims out of the proceeds of the policy. That contest could not be carried on under section 820." *N. E. Mu. Life I. Co. v. Keller*, 7 *Civil P. R.*, 109, 111. The case at bar is within the meaning of this case.

V. This court has already determined, affirming the special term, that an action like this was well brought restraining a City Court suit. *The German Savings Bank v. Habel*, 45 *N. Y. Superior Ct. R.*, 615.

*McIntyre & Settel*, attorneys, and *Frederick B. House* of counsel, for respondents, argued :—

I. Upon the papers :—That, as the motion was based upon the summons, complaint and affidavit, if those papers are insufficient and defective, the motion was properly denied. This is an action for an interpleader, in order to maintain which it must appear from the facts stated and pleaded in the complaint: (a.) That two or

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more persons have preferred a claim against the plaintiff. (b.) That they claim the same thing, whether it be a debt or a duty. (c.) That the plaintiff has no beneficial interest in the thing claimed. (d.) That the plaintiff cannot determine, without hazard to itself, to which of the defendants the thing of right belongs. (e.) There must also be an offer to bring the money or thing into court. *Dorn v. Fox*, 61 *N. Y.*, 264; *B. & O. R. R. Co. v. Arthur*, 90 *Ib.*, 234; *Nassau Bank v. Yandes*, 44 *Hun*, 55; *Atkinson v. Manks*, 1 *Cow.*, 691; *N. Y. & N. H. R. R. Co. v. Schuyler*, 1 *Abb.*, 417; *Killian v. Ebbinghaus*, 100 *U. S.*, 568. (1.) The plaintiff fails to allege in its complaint what is required by the rule laid down in these cases, "that it cannot determine, without hazard to itself, to which of the defendants the thing of right belongs," but avers, simply, "that it is ignorant of the rights of the parties and does not know to whom to pay it." A plaintiff in an equity action, such as this, has no right to come into court and ask for an interpleader on the ground that it is ignorant of the rights of the parties, for two reasons: (a.) Because by dispelling that ignorance and acquainting itself with the facts, as in this case, by a reasonable effort, it could and should have done, the filing of this bill of interpleader, and the prosecution of this action, might have been avoided. (b.) Because the allegation "that it is ignorant of the rights of the parties," and the averment required, "that it cannot determine without hazard," etc., are not synonymous. The fact that the plaintiff is ignorant of the rights of the parties, as in the complaint alleged, is not conclusive evidence that it cannot determine, without hazard to itself, to whom the thing of right belongs. (2.) The plaintiff also fails to allege what is essential and necessary, "that it cannot safely pay to either of the defendants." The complaint simply avers "that it has no interest in the fund and is advised by its counsel that it cannot safely pay to either of the

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defendants." It does not even allege that it is advised and verily believes that it cannot safely pay, etc., which might have added a little strength to the allegation, although even then it would be defective, as it has been held absolutely necessary for the plaintiff to allege positively and unqualifiedly "that it cannot safely pay to either of the defendants." An allegation that the plaintiff is "advised" respecting a certain matter is not conclusive thereof, or even of the belief of the party with respect to such matter. (3.) There is an absolute failure on the part of the plaintiff to bring the money into court, or offer to do so. There are three paragraphs or subdivisions of the complaint in none of which is it alleged that the money in question has been deposited into court, or that the plaintiff holds itself ready and willing to deposit the same. This is fatal. It has been held time and again that the prayer for relief is not the complaint; all allegations material and necessary to the cause of action must precede it, and, after the cause of action is properly stated, the prayer or demand is made. But let us examine into this prayer for relief, even as it stands. It prays: (a.) For an injunction restraining the prosecution of the action in the City Court by the defendants Friend and House; (b.) That the respective defendants be compelled to interplead among themselves; and, (c.) That the plaintiff, upon the payment of the sum of \$180 into court, be hence discharged with its reasonable costs and charges. In other words, it demands (a) the injunction and (b.) the interpleader, absolutely, and (c) its discharge, upon a certain condition, namely, upon the payment of said sum of \$180 into court. So much for the papers themselves, upon which alone, we contend, the court below was justified in denying the motion herein.

II. Upon the merits:—A separate action can no longer be maintained to restrain by injunction proceedings in another suit, in the same or another court, be-

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tween the same parties, where the relief sought in the latter suit may be obtained by a proper defence to the former one. An injunction should not be granted when there is a remedy at law, and especially not in this case, where another action is pending in which the rights of all the parties can be determined, and a judgment obtained which will be just and equitable to all the parties concerned. The courts do not favor a multiplicity of suits. *Mandeville v. Reynolds*, 68 *N. Y.*, 528, 546; *McHenry v. Hazard*, *Ib.*, 580-587; *Savage v. Allen*, 54 *Ib.*, 458; *Winfield v. Bacon*, 24 *Barb.*, 154; *Auburn City Bank v. Leonard*, 20 *How.*, 193; *Sheehan v. Hamilton*, 2 *Keyes*, 304; *Haywood v. Hood* 39 *Hun*, 596. An independent action to obtain an injunction to restrain the proceedings in another action between the same parties cannot be maintained when a stay of proceedings, if proper, can be had by an application for such stay in the first action with the view of bringing in other parties. *Haywood v. Wood*, 39 *Hun*, 596; *Savage v. Allen*, 54 *N. Y.*, 458, *aff'g* 59 *Barb.*, 291; *Richardson v. Davidson*, 24 *State Rep.*, 638, 5 *N. Y. Supple.*, 617; *Carpenter v. Keating*, 10 *Abb. N. S.*, 223; *Livingston v. Hudson River R. R. Co.*, 3 *C. R.*, 143; *Bowers v. Talmade*, 16 *How.*, 325; *Dederick v. Hoysradt*, 4 *Ib.*, 350, 3 *C. R.*, 86; *Arndt v. Williams*, 16 *How.*, 244; *Bennett v. Le Roy*, 14 *Ib.*, 178; 5 *Abb.*, 55, 156, 6 *Duer*, 683; *Winfield v. Bacon*, 24 *Barb.*, 154; *Tarrant v. Quackenbos*, 10 *How.*, 244; *Hunt v. Farmers' Loan and Trust Co.*, 8 *Ib.*, 416; *Grant v. Quick*, 5 *Sand.*, 612; *Harman v. Remsen*, 23 *How.*, 174; *Schell v. Erie Railway Co.*, 35 *Ib.*, 438, 51 *Barb.*, 368; *Conover v. Mayor*, 25 *Barb.*, 513, 5 *Abb.*, 393; *Chappell v. Potter*, 11 *How.*, 365; *Moser v. Polhamus*, 4 *Abb. N. S.*, 442; *Sippile v. Albites*, 5 *Ib.*, 76.

III. This motion is one which appealed to the sound discretion of the court, and its determination should not be disturbed except where there has been a flagrant

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abuse of that discretion, or an unquestionably unwise exercise of it. In this case there was not only not an abuse of that discretion by the lower court, but a wise, just and equitable exercise of it in favor of these defendants, and adversely to the plaintiff. The latter has had its day in court, or might have had it, in another action, but refused to avail itself of it, although the other court had jurisdiction over both the parties and the subject matter of the action. Under section 820 of the Code of Civil Procedure a defendant may, upon proof that a person not a party to the action makes a demand against him for the same debt or property, apply to the court for an interpleader. In an action in the nature of an interpleader, such as this, however, it is necessary to show what would be unnecessary under the section just quoted, namely, that the claim interposed is substantial and will probably be successful, in order to entitle plaintiff to maintain the action. *Dreyfus v. Casey*, 5 *N. Y. Supp.*, 65; *Nassau Bank v. Yandes*, 44 *Hun*, 55, *aff'g* *Nassau Bank v. Ritzinger*, 5 *St. Rep.*, 309; *Risley v. Phoenix Bank*, 83 *N. Y.*, 318.

IV. It appears to be a well settled point of law, from the whole course of authorities on this question, that the equitable remedy of an interpleader, independent of recent statutory regulations, depends upon and requires the existence of certain essential elements, and among them the following: (a) The same thing, debt or duty must be claimed by both or all the parties against whom the relief is demanded. (b) All their adverse titles or claims must be dependent or be derived from a common source. (c) The person asking the relief—the plaintiff—must not have nor claim any interest in the subject matter. (d) He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder. *Pom. Eq. Jur.*, § 1322,

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vol. 2, 2d ed.; *The N. Y. & H. R. R. Co. v. Haws*, 35 *N. Y., Super.* (3 *J. & S.*), 380, 382, 383, 384. (The case last cited seems almost conclusive of nearly all of the issues involved on this appeal, and is respectfully submitted to the careful consideration of the court.)

V. An action of interpleader cannot be sustained where, from the complaint itself, it appears that one of the claimants is clearly entitled to the debt or thing claimed, to the exclusion of the other. *Bassett v. Leslie*, 123 *N. Y.*, 396; *S. C.*, 33 *St. Rep.*, 685. Citing *Mohawk and Hudson R. R. Co., v. Clute*, 4 *Paige*, 384; *Dorn v. Fox*, 61 *N. Y.*, 268; *Baltimore and Ohio R. R. Co., v. Arthur*, 90 *Ib.*, 234. And the court below was evidently impressed with the fact that, upon the very face of the complaint, the plaintiff was not entitled to the relief demanded, the defendants Friend & House being clearly entitled to the amount claimed to the exclusion of the defendant Podrasky, who set up a separate, independent, paramount and antagonistic title, and not derivative under that of the bailor, or which originated after the commencement of the bailment; and the learned judge cites: *Bassett v. Leslie*, *supra*, and *Lund v. Seaman's Savings Bank*, *supra*. And Mr. Justice VAN BRUNT, in delivering the opinion of the court in the case of *the Nassau Bank v. Yandes*, 44 *Hun*, 55, changed the rule laid down in *Atkinson v. Hanks*, 1 *Cow.*, 703, and held that an action for an interpleader, etc., cannot be maintained where the facts stated do not show that there is a reasonable and substantial doubt as to the right of one of the defendants to a recovery.

BY THE COURT.—GILDERSLEEVE, J.—On or about the 7th day of April, 1892, the defendant Guttman deposited the sum of \$180 with the plaintiff, which is a savings bank organized under the laws of this State. Subsequently the defendants Friend & House made a demand upon the plaintiff for said sum so deposited,

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Opinion of the Court, by GILDERSLEEVE, J.

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claiming that it had been assigned to them by the defendant Guttman, and they brought a suit in the City Court to recover such sum, which suit is defended by this plaintiff on the ground that it knows of no such assignment by Guttman to Friend & House. Plaintiff further claims that the defendant Guttman still claims the deposit as his own, and that the defendant Podrasky also has made a demand on plaintiff for it, claiming that said money was stolen from him by the defendant Guttman. Plaintiff has, therefore, brought this action to restrain the defendants Friend & House from further prosecuting their action in the City Court, and also to compel the respective defendants to interplead among themselves, and praying that plaintiff, upon the payment into court of the said sum, be discharged from all liability, and be allowed its costs and disbursements. Plaintiff applied to the court for an injunction restraining the defendants Friend & House from a further prosecution of their action in the City Court, and from the order denying the motion plaintiff appeals to the general term.

From the affidavit of defendant Guttman, it appears that he admits making the assignment to Friend and House, and denies that he has made any claim to the said money since such assignment. This disposes of any apprehension that plaintiff may feel as to the position of the defendant Guttman. It also appears from the appeal papers that the charge of stealing the money made by the defendant Podrasky against the defendant Guttman was dismissed by the Grand Jury. We think, therefore, that the plaintiff's fears of the claim of Podrasky are too shadowy and unsubstantial to be given serious consideration. Guttman's claim is disposed of by his own affidavit, in which he swears he assigned it to Friend & House. Podrasky, as plaintiff asserts, claims by title superior to the depositor, Guttman, alleging that Guttman stole the money from him ; but the court will refuse

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Statement of the Case.

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to allow a savings bank to implead an adverse claimant of a deposit in the bank, where claimant claims by title superior to depositor, as the bank cannot dispute the title of its depositor *Lund v. Seaman's Savings Bank*, 20 *How.*, 461; unless, indeed, the third party who claims to have been despoiled of his money proceeds by process of law to enforce his rights, which Podrasky has not done. See *Lund v. Seaman's Savings Bank*, 23 *How.*, 258.

We are of the opinion that the plaintiff is not entitled to an interpleader, and, therefore, no right to the injunction sought, existed.

The motion for the injunction was properly denied. The order appealed from is affirmed, with ten dollars costs and disbursements.

FREEDMAN, P. J., concurred.

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CHARLES E. HOVEY, ET AL., APPELLANTS v.  
GEORGE ELLIOTT, ET AL., AS EXECUTORS, ETC.,  
RESPONDENTS.

*Jurisdiction of the Supreme Court of the District of Columbia, and the validity of its decrees, must be determined by the laws of the United States, and the construction and interpretation of the same by the Supreme Court of the United States.*

In this case the referee found that the decree in question was invalid for want of jurisdiction of the said Supreme Court of the District of Columbia to enter the same.

*Held*, that the referee reached the right conclusion, and the judgment is affirmed upon the opinion of the referee relating to the question of jurisdiction of said court.

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided October 24, 1892.*

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Opinion of REFEREE.

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Appeal by plaintiffs from a judgment entered upon the report of a referee, dismissing the complaint.

The facts and points involved in the case appear fully from the following opinion of the referee, before whom the case was tried, and upon which the court, at general term, affirms the judgment.

DANIEL G. ROLLINS, Referee.—“In June, 1873, there was pending before the mixed commission on British and American Claims, then sitting at the city of Washington, in the District of Columbia, a certain claim in behalf of one Augustine R. McDonald. McDonald entered into a written agreement with the plaintiffs in this action, whereby, in consideration of services thereafter to be rendered by them in the prosecution of such claim, it was provided that they should receive a sum equal to twenty-five *per centum* of the amount that should be recovered—‘the payment of which sum’ the agreement proceeds to say, ‘is hereby made a lien upon the said claim, and upon any draft, money, or evidence of indebtedness which may be paid or issued thereon.’

“In September, 1873, the commission awarded to McDonald, in satisfaction of his claim, the sum of \$197,000.

“In August, 1874, McDonald assigned the whole of this award to one William White.

“In the following October these plaintiffs filed, in the supreme court of the District of Columbia, a bill in equity against McDonald and White, alleging therein that McDonald was indebted to them, under the agreement aforesaid, in the sum of \$49,297.50, and that they had a lien to the extent of such sum upon the award in his favor. The bill prayed, among other things, that the defendants, McDonald and White, be restrained from assigning or collecting more than three-fourths of the amount of the award in McDonald’s favor, and that a decree be entered establishing the complainants’ lien

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upon the remaining one-fourth. Such proceedings were thereafter had that one-half part of the sum so awarded was paid into court to meet the claim and lien of these plaintiffs.

“Of the funds thus deposited, George W. Riggs, a banker in Washington, D. C., was appointed receiver. As such receiver, pursuant to the direction of the court, he invested such funds in certain bonds of the District of Columbia, guaranteed by the United States, and payable at its treasury.

“To the plaintiffs’ bill the defendants interposed a demurrer, which was thereafter sustained. An amended complaint was met by a second demurrer, which was also sustained, and on June 24, 1875, a decree was entered dismissing the plaintiffs’ bill with costs. On the same day the plaintiffs entered an appeal from that decree to the general term of the supreme court of the District of Columbia.

“Four days later (that is, on June 28, 1875), another decree was entered in precise conformity with the earlier one, except that its contents were supplemented by a direction to the receiver to pay to the defendants, McDonald and White, the funds in his hands belonging to the cause.

“Pursuant to such direction, and on the day of the entry of the decree wherein it was contained, the receiver delivered to McDonald the bonds in question, but not until he had first consulted the judge holding the court in which such decree had been entered, and been by him advised that that course was proper for him to pursue. McDonald on the same day sold and delivered the bonds to the banking firm of Riggs & Co., of which the receiver was a partner, obtaining upon such sale their then market value.

The bonds were promptly taken by Riggs & Co. to the Treasury of the United States, and were there surrendered. In their place there were issued to Riggs &

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Co. certain new bonds, which were thereafter, in the month of December, 1875, sold and delivered to various purchasers. On July 2, 1875, these plaintiffs took an appeal to the general term of the supreme court of the District of Columbia from the aforesaid decree of June 28, 1875. On March 4, 1876, that decree, as well as the earlier decree of June 24, 1875, were reversed with costs. The cause was remanded to the special term, with leave to the defendants in the action to answer the complainants' bill.

"In May, 1876, McDonald and White interposed an answer, denying the validity of the complainants' claim. Upon the issues thus joined testimony was taken at diverse times during the years 1875 and 1876.

"In June, 1877, the complainants obtained an order from the supreme court of the District of Columbia at general term, requiring the defendants, McDonald and White, to 'pay over to the registry of the court' the sum of \$49,297.50, which had been paid them by the receiver. This order was disobeyed, and thereupon the complainants, in September, 1877, moved the defendants, McDonald and White, to show cause 'why they and each of them should not be *punished* for disobedience of the order *as for a contempt*.' On December 8, 1877, the supreme court of the District of Columbia made a decree at general term, that 'the rule upon the defendants to show cause *why they should not be decreed to be in, and punished as for a contempt of court*, etc., be made absolute, and that the said McDonald and White be taken and deemed to be in contempt of the aforesaid order,' etc. Such decree further provided that 'unless McDonald and White, within six days from the entry of this order, and the service of a copy thereof upon their solicitors, shall in all respects comply with the said order of June 19, 1877, and pay unto the said registry of this court the sum of \$49,297.50, *the answer filed by them in the cause be stricken out, and that this*

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*cause proceed as if no answer therein had been interposed*; and that, until the said defendants shall comply with the said order of June 19, 1877, all proceedings on the part of said defendants in this cause be and the same are hereby perpetually stayed.'

"On December 29, 1877, the supreme court of the District of Columbia, at general term, on motion of the complainants, and proof of non-compliance on the part of the defendants, McDonald and White, with the requirements of the decree of December 8, 1877, 'ordered, adjudged, and decreed that the answer filed in this cause by the defendants, McDonald and White, be stricken out and removed from the files of the court, and that this cause do proceed as if no answer herein had been interposed.'

"On February 12, 1878, the supreme court of the District of Columbia, at general term, made decree as follows: '*The answer of defendants having been removed from the files for their contempt* in refusing to obey the order of court and deposit in the registry the sum of \$49,297.50, it is now ordered, adjudged, and decreed that the bill be taken *pro confesso* against them.'

"On April 17, 1878, that order was made absolute by another order or decree which, after reciting material allegations in the complainants' bill as 'standing without denial on the part of the defendants,' ordered and adjudged 'that the complainants have a lien upon the claim of Augustine R. McDonald against the United States \* \* \* of \$197,190, and upon any draft, money, evidence of indebtedness, or proceeds thereof.'

"The present action was commenced on April 16, 1884, one day less than six years after the entry of the decree last above mentioned.

"It is claimed by the plaintiffs herein that Riggs & Co. were purchasers *pendente lite* of the bonds on which they (the plaintiffs) had a lien; that the evidence of

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that lien is conclusively established by the decree of the supreme court of the District of Columbia, and that their cause of action against the defendants accrued when that decree was entered, and at no earlier date.

“The defendants on the other hand claim—

“*First.* That at the time of the purchase of the bonds in question by Riggs & Co. there was no *lis* actually *pendens*. *Second.* That the bonds were negotiable instruments transferable by mere delivery; that they were purchased by Riggs & Co. in good faith, and that the doctrine of *lis pendens* has here, therefore, no application. *Third.* That even if the plaintiffs had a lien upon the bonds in question, and if such bonds were received and were subsequently sold by the defendants with knowledge of the plaintiffs’ claim, that lien was practically extinguished at the time of the sale, so that whatever cause of action they may have had against Riggs & Co. *then* accrued, that is to say, in December, 1875, more than six years before the commencement of this action, which is, therefore, barred, as these defendants claim, by the statute of limitations. *Fourth.* That the supreme court of the District of Columbia exceeded its jurisdiction in making the aforesaid decree of April 17, 1878; that such decree is wholly void, and that, as it is the sole foundation of the plaintiffs’ claim, the defendants are entitled to judgment.

“*FIRST.* In support of the first of these four propositions urged in defendants’ behalf, it is claimed that upon the entry of the decree of June 24, 1875, dismissing plaintiffs’ bill, the *lis* theretofore *pendens* utterly ceased so to be; that this decree of June 24 was vacated by the decree of June 28, from which no appeal was taken until July 2, four days after the purchase of the bonds by the defendants, and that, therefore, no *lis* was pending at the time such purchase was made.

“These two decrees of June 24 and June 28 were both before the general term of the supreme court of the

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District of Columbia, and were both reversed by its decree of March 4, 1876; they are both referred to by the Supreme Court of the United States in *Hovey v. McDonald*, 109 *U. S.*, 150, and their relation to each other is there commented upon. At page 158, the judge, pronouncing the opinion of the court, says: 'The correction of the form of the decree' [of June 24th] 'by adding the direction to the receiver to pay over the money in his hands to the defendants was a thing of course. It was merely expressing the legal effect and consequences of the decree. It was an *amendment* which the court below was competent to make notwithstanding the appeal.'

"The decree of June 28 seems to have been entered without notice to the complainants. Up to the time of its entry they had complied with all the requirements of the law necessary to give them a *status* as litigants in the pending cause. In the absence of a well-settled law or practice that would make such a finding necessary, I cannot hold that the entry of the supplementary or amendatory decree had the effect, which defendants' counsel claim that it produced, of extinguishing such rights as complainants may theretofore have had under the doctrine of *lis pendens*. The decree of June 24 is indorsed, 'Decree sustaining demurrer and dismissing bill;' that of June 28 is indorsed, 'Order discharging receiver.' These indorsements are not without significance as in some degree interpretative of the intended effect of the decrees in question, and their true significance. While there are some technical difficulties in upholding the plaintiffs' claim that the bonds were sold *pendente lite*, I have finally reached that conclusion.

"SECOND. Were the bonds here in question negotiable instruments? Each bond was in form a certificate to the effect that the District of Columbia was indebted unto a person therein named, or his 'assigns,' in a specified sum, payable at a specified date at the

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Treasury of the United States, with interest semi-annually; the certificate declares that the issuance of the bond is authorized by an act of Congress, which pledges the faith of the United States that the United States will provide, by certain specified means, the revenues necessary to pay the interest on the bond and to create a sinking fund for paying the principal at maturity. The register of the treasury certifies on each of these bonds that it has been registered in the office of such register in accordance with the provisions of the aforesaid act. On the back of the bonds there is a blank form of assignment, for the authorization of a transfer of the bond on the books in the office of the register, followed by a blank form of acknowledgment, which is in turn followed by a 'note' explaining how the assignment should be executed and acknowledged in case such execution and acknowledgment should not be effected at the treasury department.

"It appears in evidence that it has long been the custom of bankers and brokers dealing in these securities to pass them from hand to hand like negotiable paper, when properly indorsed, with an assignment in blank, so as to permit the registered holder to insert at his pleasure the name of any person to whom he wishes the bonds to be transferred. The Supreme Court of the United States held in *County of Wilson v. National Bank*, 103 *U. S.*, 776, that 'in order to make a promissory note or other obligation for the absolute payment of a sum certain on a certain day negotiable, it is not essential that it should in terms be payable to "bearer" or "order." Any other equivalent expression, demonstrating the intention to make it negotiable, would be of equal force and validity.' In *White v. Vermont & Massachusetts R. R. Co.* 21 *How.*, 575, the same court also enunciated the rule that bonds which 'are intended by the obligor to be negotiable must be so regarded. Now, can it be fairly said that the maker of

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these bonds has indicated on their face an intention to give them the character of negotiable instruments? Bonds of the United States are issued in two forms. Some of them are registered on the books of the treasury, and interest thereon is payable only to the person in whose name the registration is made, or to some other person to whom has been made a duly registered assignment. Bonds issued in the other form are payable to bearer, and the amounts of interest thereon, as they severally fall due, are indicated by coupons that may be detached at the pleasure of the holder. It was contended in *Mechanics' Bank v. New York & New Haven R. R. Co.*, 13 *N. Y.*, 599, that certificates of stock in the defendant-corporation were to be regarded as negotiable instruments. In delivering the opinion of the Court of Appeals, COMSTOCK, J., said (p. 623): 'Aside from the absence of any language of these certificates which can impart to them a negotiable character, both the laws of the corporation and the certificates themselves contain special restrictions which seem to me to put this question at rest. I do not suppose that a corporation, without something very extraordinary in its charter, can place such restraints upon the sale of its stock that the individual holder may not transfer as good a title in equity as he himself possesses, by any mode of assurance good upon general principles of law. But if a natural person has an undoubted right so to express the terms of his obligation that it shall not be negotiable in the commercial sense, or in any sense which can give to the purchaser a title superior to that of his vendor, I see no reason to doubt that corporations possess the same right. Has the defendant so expressed itself in these certificates of stock? I think it has. *It has distinctly declared, both in its by-laws and on the face of the certificates, that shares can be transferred only on the books and on the surrender of the evidence of the previous owner's title.*'

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The fact that the company made the shares transferable only on its books, and on the surrender of the previous owner's title, seems to be regarded by our Court of Appeals as conclusive of its intention that the shares should not be negotiable.

"In view of the fact that the bonds here in question contain a certificate of registration in the office of the register of the treasury, and prescribe the form of assignment by which they may be transferred on the books of that office, I hold that these bonds were not intended to be, and were not and are not, negotiable.

"THIRD. Is the plaintiffs' right of action barred by the statute of limitations?

"This is the second trial of this suit. It was first tried before Hon. EDWARD PATTERSON, now a justice of the supreme court, as referee.

"He found that the action was of such a character as to fall within the six-year limitation of the statute, and that the cause of action accrued more than six years before suit was brought.

"And accordingly he gave judgment dismissing the complaint. Upon appeal to the general term of the Superior Court this judgment was affirmed. The opinion of Judge INGRAHAM in favor of affirmance was concurred in by Judges SEDGWICK and FREEDMAN. The judgment was subsequently reversed by the Court of Appeals upon the ground that the plaintiffs' right of action was not complete against the defendants until April 17, 1878, when the decree *pro confesso* was entered against McDonald and White, and that, therefore, the plaintiffs' action was not barred by the statute of limitations. The prevailing opinion in the Court of Appeals was written by BRADLEY, J., with whom concurred Judges POTTER, VAN, and PARKER. HAIGHT, J., wrote a dissenting opinion, and favored affirmance of the judgment below upon the ground that the cause of action arose at the time of the sale of the bonds by Riggs &

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Co. Judges FOLLETT and BROWN concurred in this dissent. It thus appears that of eleven judges who have heretofore passed upon this question, seven have found that the action is barred by the statute of limitations, and four have found that it is not. Those four, however, constituted a majority of one of the divisions of our Court of Appeals which pronounced the judgment of reversal, and of course, therefore, their view must now prevail unless there is some essential variations between the facts as they appear upon the present trial and the facts which were before the Court of Appeals when it ordered the reversal of the judgment entered on Judge PATTERSON's report.

"It is claimed by counsel for the defendants that there is such essential variation.

"They argue that the basis of Judge BRADLEY's conclusions was the finding of the former referee that the payment by McDonald to these plaintiffs of the sum stipulated in their agreement was '*to be made a lien*' upon the claim, etc., etc., and that if the learned judge had been advised by the appeal-book of the precise terms of the agreement (as was not in fact the case) he would have taken a different view of the matter.

"The agreement, after fixing the amount of the plaintiffs' compensation, provides that its payment '*is hereby made a lien* upon the said claim.' In its decree of April 17, 1878, the supreme court of the District of Columbia refer to the lien in these words: 'The payment of which sum was agreed to be and *made a lien* on the said claim.'

"Referee PATTERSON granted the plaintiffs' third request to find at the former trial, and found that the payment of the sum agreed on as the plaintiffs' compensation from McDonald '*was made a lien* upon the said claim and upon any draft,' etc., etc.

"In the course of his opinion in favor of reversing the judgment below, Judge BRADLEY says: 'Plaintiffs'

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right to a lien existed in contract entered into before the award was made by the commission, by the terms of which the payment of their claim for services *was to be made* a lien upon it.' Elsewhere he refers to the contract on which the plaintiffs rely as *executory*, and he then says: 'The lien upon which the plaintiffs relied existed in executory contract and was cognizable in equity only until it was perfected, either by recognition or contract of McDonald, in terms making it so *in presenti* after performance by the plaintiff, or by decree to that effect.' He says at a later stage of his opinion; 'The contract in question may be treated as an agreement to give the plaintiffs a lien dependent upon the terms and conditions of the contract, and while it attached as a lien in equity upon the award when made, it was not, by force of the contract, made a specific lien *in presenti* or recognizable at law until it was perfected by the decree.'

"After careful consideration of the opinion of Judge BRADLEY, and of the action of the Court of Appeals upon the application of these defendants for a reargument, it seems to me that if the facts as they then appeared before the court had been precisely such as appear upon the present trial, its decision in the matter of the statute of limitations would not have been changed.

"When Judge BRADLEY referred to the agreement as 'executory' he had in mind, I think, the fact that the services with which the lien was associated were to be thereafter rendered, and that unless they should be in fact rendered the lien would be inoperative. And the learned judge then proceeded to the conclusion that the plaintiffs' lien could not become perfect until, *after the services should have been in fact rendered*, such lien should either be acknowledged by McDonald or recognized by decree. Acting upon that interpretation of the meaning of the decision of the Court of Appeals, I feel bound to hold that this action is not barred by the statute of limitations.

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“FOURTH. Does the final decree of the Supreme Court of the District of Columbia, entered on the 17th day of April, 1878, furnish sufficient support for its judgment in favor of these plaintiffs?

“It is claimed in their behalf that their lien is conclusively established by such decree, and that, even if the Supreme Court of the District of Columbia was clearly in error in taking the steps which led up to the making of that decree, the error is one which can only be taken advantage of in a direct proceeding for its correction, and its existence must in this collateral proceeding be wholly disregarded.

“The testimony shows that the bill of complaint in the District of Columbia action alleged the execution of the aforesaid agreement between the plaintiffs and the defendants, and the rendering of the services called for by that agreement so as to perfect the plaintiffs' lien. It further shows that in May, 1876, an answer was interposed by the defendants, McDonald and White, denying that the plaintiffs had rendered any services under said agreement, and alleging that the execution of that instrument had been obtained by fraud. It shows, too, that testimony had been taken in the action by both the plaintiffs and defendants, and that when the cause came upon the calendar at special term in April, 1877, it was certified to the general term, there to be heard in the first instance.

“I have already referred in detail to various proceedings in the Supreme Court of the District of Columbia between June, 1877, when McDonald and White were ordered to pay into the registry the sum of \$49,297.50, and April, 1878, when, in disregard of the answer of McDonald and White and of the testimony that had been taken in their behalf, that court entered judgment in accordance with the prayer of the complainants. There was no adjudication, nor was there pretence of adjudication, upon the actual merits of the matters in

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controversy, for the court had theretofore stricken the defendants' answer from the files, and had avowedly and distinctly pursued that course by way of punishing the defendants for their contempt in refusing to obey the court's order for the deposit of moneys in its registry.

" Now, it is a well-settled doctrine of our Federal jurisprudence that the United States courts have no common-law jurisdiction, but such jurisdiction only as has been conferred upon them by statute. The statutory authority for punishment for contempts in those tribunals is limited to the imposition of a fine or of imprisonment. Section 17, *Judiciary Act*, 1789; *Revised Statutes, U. S.*, § 725; Section 34, *Act of February 21, 1871*; *Anderson v. Dunn*, 6 *Wheat.*, 227; *Ex parte Robinson*, 19 *Wall.*, 512.

" It seems clear that in pronouncing its decree of April 17, 1878, under the circumstances that I have already referred to, and after the striking of the defendants' answer from the files by way of punishment for their contempt, the Supreme Court of the District of Columbia transcended its authority.

" Is its decree for that cause void ?

" *McVeigh v. U. S.*, 11 *Wall.*, 259, was decided upon the following state of facts : Certain property there in controversy had been seized by a United States marshal in 1863 and libeled for forfeiture upon the allegation that its owner had held an office of honor under the Confederate Government, and that he had in various ways given aid and comfort to the rebellion. In response to the monition which had cited all persons interested in the property, or claiming an interest, to appear and make their allegations in that behalf, the owner had appeared and had filed claim and answer. The district attorney thereafter moved that such claim, answer and appearance be stricken from the files on the ground that the claimant, as his answer disclosed, was, at the time of filing the same, ' a resident within the city of Richmond,

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within the Confederate lines, and a rebel.' The motion of the district attorney was granted; a decree of condemnation of forfeiture was entered, and the property was sold. The decree was subsequently affirmed by the circuit court, and thereafter the case was taken by writ of error to the Supreme Court of the United States. Mr. Justice SWAYNE, delivering the unanimous opinion of the court, 11 *Wallace*, 259, said: 'In our judgment the district court committed a serious error in ordering the claim and answer to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order, in effect, denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.'

"At a later day the validity of the same decree was brought collaterally in question in the case of *Windsor v. McVeigh*, 93 *U. S.*, 274, which was an action of ejectment. In delivering the opinion of the Supreme Court, Mr. Justice FIELD, after citing the language above quoted from the opinion of his associate justice, said: 'The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect

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in any other tribunal. Until notice is given the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be by the law of its organization over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or charges made; it is a summons to him to appear and speak, if he has anything to say why the judgment sought should not be rendered. A denial to a party of the *benefit* of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, "Appear, and you shall be heard," and when he has appeared, saying: "Your appearance shall not be recognized, and you shall not be heard." In the present case the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus entered with moderation; it was in fact a mere arbitrary edict, clothed with the form of a judicial sentence. The law is and always has been that whenever notice or citation is required the party cited has a right to appear and to be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is, in legal effect, a recall of the citation to him. . . . The position of the defendants' counsel is that, as the proceeding for the confiscation of the property was one *in rem*, the court by seizure of the property acquired jurisdiction to determine its liability to forfeiture, and consequently had a right to decide all questions subsequently arising in the progress of the cause, and that its decree, however erroneous, cannot, therefore, be collaterally assailed. . . . The doctrine invoked by counsel that where a court has once acquired jurisdiction it has a right to decide every question which arises in a cause, and that its judgment, however erro-

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neous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. . . . Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments; it must act judicially in all things, and cannot then transcend the power conferred by law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. . . . The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void, because the court in rendering them would transcend the limits of its authority. . . . So a departure from established modes of procedure will often render a judgment void; thus the sentence of a person charged with felony upon conviction by the court without the intervention of a jury would be invalid for any purpose. . . . The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent and character of its judgment, the law which is applicable to it. . . . It was not within the power of the jurisdiction of the district court to proceed with the case so as to affect the rights of the owner after his appearance had been stricken out and the benefit of the citation to him thus denied. For jurisdiction is the right to hear and determine; not to determine without hearing.'

"Mr. Justice WOOD, delivering the opinion of the Supreme Court of the United States in *United States v. Walker*, 109 *U. S.*, 258, said: 'Although a court may

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Appellants' points.

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have jurisdiction over the parties and the subject-matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void.'

"In the case just cited, the Supreme Court upheld a collateral attack upon a decree of the Supreme Court of the District of Columbia. That court was authorized to hold terms for the transaction of orphans' court business; it was proceeding with the settlement of the account of an administratrix of a decedent's estate. Over that account, and over the administratrix herself, the court had unquestioned jurisdiction. The decedent had been administrator of another estate, not fully administered at the time of his death. An administrator *de bonis non* of such other estate had been appointed, and the decree directed the accounting administratrix to pay over to such administrator *de bonis non* a certain sum of money. The Supreme Court of the United States held that the administratrix *de bonis non* was not entitled to recover from the accounting administratrix; that the supreme court of the district had exceeded its jurisdiction in making the order, and that the order was therefore void. This course was taken, not in a direct proceeding to review the decree, but in an action at law on the administrator's bond.

"Upon these authorities, and numerous others to which I have been referred by counsel, I hold that the validity of decree of the Supreme Court of the District of Columbia may properly be inquired into in this action; and upon careful consideration of all the evidence, I am of the opinion that such decree is invalid for want of jurisdiction of the court wherein it was entered to enter the same; and because of this invalidity I find that the defendants herein are entitled to judgment."

*Thomas M. Wheeler*, attorney, and *H. B. Titus* of counsel, for appellants.

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Opinion PER CURIAM.

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*R. D. Harris*, attorney, and *William G. Choate* and *John Selden* of counsel, for respondents.

PER CURIAM.—Upon the case as now presented the right of the plaintiff to any relief whatever rests upon the alleged decree of the Supreme Court of the District of Columbia entered on the 17th day of April, 1878. The referee found that the decree was invalid for want of jurisdiction of the court wherein it was entered to enter the same.

The question of validity or invalidity of the decree must be determined by the laws of the United States, and by the interpretation of those laws by the Supreme Court of the United States. Whether a decree of the same character made under the same circumstances by a court of the state of New York, or of any other state, would or would not be valid, is an immaterial question, if under the decisions of the Supreme Court of the United States the decree was one which a federal court was wholly incompetent to make. Upon a careful examination of all that has been cited upon this point by both parties, we are of the opinion that the learned referee reached the right conclusion.

The judgment should be affirmed, with costs, upon that part of the opinion of the referee which relates to the question of jurisdiction.

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Statement of the Case.

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**JACOB LORILLARD, RESPONDENT v. WILLIAM P. CLYDE, ET AL., APPELLANTS.**

*Contract of guaranty—Action to recover dividends, at the rate of 7% per annum, on \$150,000 of the capital stock of the Philadelphia and New York Steam Navigation Company.*

Defendants claimed that the dissolution of the corporation, by proceedings set forth in their answer, released them from the performance of the contract of guaranty, and the effect of those proceedings upon the contract, and how far they furnish a legal excuse for non-performance, is the main question for decision.

*Held, by the court below, and now on appeal, that the contract was not affected by said proceedings and they constituted no defence to the action.*

Before FREEDMAN, P.J., DUGRO and GILDERSLEEVE, JJ.

*Decided October 24, 1892.*

Appeal by defendants from a judgment rendered in favor of plaintiff, after a trial before the court at the trial term without a jury.

The facts and points in the case appear fully in the following statement and opinion of the court below upon which the judgment appealed from is affirmed.

“The plaintiff and defendants were engaged in the business of transporting freight between New York and Philadelphia. The plaintiff owned what was called the outside line, and the defendants ran what was known as the inside route. They were competing for trade, a course detrimental to both. The parties came together on May 5, 1874, entered into an agreement in writing for the purpose of consolidating the conflicting interests, and uniting their capital under one management, a scheme supposed to be mutually beneficial. It provided for the consolidation of the two lines, in a corporation to be formed under the laws of the state, with a capital

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Statement of the Case.

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of \$300,000. The property put in by Lorillard was valued at \$170,000. That contributed by the defendants was rated at \$130,000. The parties were to take stock to the extent of their respective interests, and the defendants were to purchase \$20,000 of Lorillard's stock, which would bring that held by him down to \$150,000, and increase that possessed by them to an equal amount. The arrangement was carried out, the corporation formed, the property conveyed to it and stock issued and transferred in the manner stated. The agreement further provided that the defendants should have the management of the corporation and business, and that they should guarantee to the plaintiff a dividend of not less than seven per cent. per annum for seven years. The agreement went into effect July first, 1874. The defendants were to receive for their management the usual commission of two and a half per cent. in and five per cent. out on the freight carried, and it was agreed that the management of the line should be in good faith and as economical as consistent with the interests of the business. The defendants have, by force of judgments and otherwise, paid the agreed seven per cent. up to the first day of July, 1879. The present action is to recover the so-called dividends from that time until July first, 1881, when the time for their payment according to the terms of the contract expired.

“The main defence urged by the defendants is contained in the twelfth paragraph of their amended answer, as follows: ‘That the consideration for which they entered into the covenant to guarantee to the plaintiff a dividend of not less than seven per cent. per annum for seven years upon the capital stock held by the plaintiff, was the provision contained in said agreement that the defendants should have the management of said corporation and business, and receive the commissions and other benefits provided for in said contract for the full period of seven years for which said dividend was

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Opinion of McADAM, J.

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guaranteed. That in violation of said agreement the said plaintiff, on or about the 14th day of April, 1879, procured an action to be brought by the attorney-general in the name of the people of the state, in the Supreme Court, against said corporation and these defendants and Benjamin Betts, John A. Leslie and Amos Rogers, as officers and incorporators thereof, for the dissolution of said corporation. That the action then brought in the name of the people was in fact instituted and carried on in the interest and for the benefit of the plaintiff, and was continued and managed throughout by him and his private counsel, and at his sole instance, and that shortly after the commencement of this action, the plaintiff was, by an order of the Supreme Court, duly entered in said action, made a party plaintiff with the people, and thereafter remained a party thereto. That on or about the 10th day of July, 1879, by an order of the Supreme Court made in said action, one Howard P. Moody was appointed the receiver of the said corporation, and thereupon entered upon the performance of his duties as such receiver and took possession of all the steamers, assets, books and property of the said corporation. That final judgment was thereafter entered in said action dissolving said corporation and vacating its charter, and all the property and assets were sold or disposed of and its business wound up and destroyed. All of which matters, acts and things were done or procured to be done by the said plaintiff, and that from and after the appointment of the said receiver the defendants were deprived of all and any management or control of said corporation or its business.'

"How far the proceedings just referred to furnish the defendants with a legal excuse for not performing their contract with the plaintiff is the main question now to be decided."

McADAM, J.—"Former adjudications made in actions

between the same parties on the identical agreement have conclusively determined several matters which must now be regarded as authoritatively settled. *First.* That the contract sued upon is valid and enforceable. *Lorillard v. Clyde*, 86 *N. Y.*, 384. *Second.* That the defendants were liable upon it during the time the corporation subsisted *de facto*, although there existed causes for its dissolution. *Same v. Same*, 16 *J. & S.*, 409, *aff'd* 99 *N. Y.*, 196. *Third.* That separate actions may be brought on the contract as the installments fall due, and separate recoveries had in each. *Same v. Same*, 122 *N. Y.*, 41. *Fourth.* That the plaintiff was in no legal sense a party to the action by the people of the state, and not concluded by the findings therein. *Same v. Same*, 16 *J. & S.*, 409; 99 *N. Y.*, 196, *supra*.

“The only phase of litigation not fully covered by these determinations is the effect of the final dissolution of the corporation upon the rights and liabilities of the parties; and in disposing of this issue the nature and purpose of the special agreement sued upon must be kept prominently in view. The contract was made prior to the formation of the corporation, was not merged in it, but was to exist independently of it. It was not an obligation to pay dividends, technically so-called, for that term means a sum which a corporation sets apart from its profits to be divided among its members. *Lockhart v. Van Alstyne*, 31 *Mich.*, 76; *Taft v. The Hartford R. R. Co.*, 8 *R. I.*, 310; *Morawetz on Corporations*, § 457. And no corporation can declare a dividend except from surplus profits. 2 *R. S.*, 7th ed., p. 1364, § 1. And it is an offence to withdraw or pay a stockholder any part of the capital stock. *Penal Code*, § 594.

“It is evident, therefore, that the term dividends was used in the agreement arbitrarily, not in its literal sense, and merely as indicating a profit the plaintiff was to receive not from the corporation but from the defendants, for they were to pay the plaintiff the so-called dividends

whether the corporation made profits or losses, and without regard to the amount of either. The payments were to continue absolutely, and at all events for the period of seven years, the promise to pay being the consideration upon which the plaintiff consented to the consolidation, transferred the competing line to the corporation and yielded its management to the care of the defendants.

“The plaintiff did all he agreed to do, and the defendants took the responsibility of every contingency that might happen for seven years thereafter.

“The plaintiff had the right to assume that the defendants, upon taking control of the corporation, would manage it within the limits of the corporate charter. The power to control certainly implied the duty of managing the trust faithfully and with due regard to the state as well as to the individual rights and interests of all concerned. The defendants must be held to have known that in case of misuser of the corporate franchises, or departure from any of the specific objects for which the corporation was instituted, it was liable to have its charter annulled at the suit of the state; for, as Justice STORY said in *Terrett v. Taylor*, 9 *Cranch*, 51: ‘A private corporation may lose its franchises by a misuser of them, and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and the tacit condition annexed to the creation of every such corporation.’

“The possibility of forfeiture depending, as it did, upon the proper management of the corporate affairs by the defendants, was not permitted by the plaintiff to be made a condition upon which the payments promised were to cease, and no such condition can be added now by implication or otherwise. The plaintiff did not rescind the agreement, and brought no action calculated to determine it, or to absolve the defendants from its complete performance.

“Suits to determine the forfeiture of corporate franchises must be at the instance and under the authority of the King, in England, and of the state in this country. Private individuals have no control of the proceedings, for they are matter of public and not of private concern. The provisions regulating such actions are contained in section 1798 of the Code, and the form of judgment is prescribed by section 1801; and there is nothing in either section, or in the procedure, which operates upon or affects the agreement in suit.

“If it had been an agreement where dividends were to be paid from the earnings of the corporation, it would even then be unnecessary to consider the effect of the judgment dissolving the corporation, for the reason that the want of earnings would be a complete defence in itself without reference to the cause of their non-existence. But, as before suggested, it is immaterial under this agreement whether there were profits or even losses, for, without regard to either, or the sources from which losses might arise or profits accrue, the plaintiff was to receive from the defendants a sum equal to seven per cent. upon his capital stock, and this they were to pay absolutely and without reference to any future possibility. The rule is that when a party has undertaken absolutely to do a thing he is not excused from liability by the occurrence of events which render the performance of his promise impossible; or, as BLACKBURN, J., expressed it, ‘We think it firmly established, both by decided cases and on principle, that where a party has either expressly or impliedly undertaken, without any qualification, to do a thing and does not do it, he must make compensation in damages, though the performance was rendered impracticable by some unforeseen cause over which he had no control. *Ford v. Cotesworth*, *L. R.*, 4 *Q. B.*, 134. If a person create a charge upon himself he is bound thereby, notwithstanding the occurrence of any contingency, because, if he had chosen, he might have provided

against it by the stipulations in his contract. *Chitty on Con.*, 11th Am. ed., 1074–1075 ; 3 *Am. and Eng. Enc. of Law*, 900.'

"The claim that the proceeding by the state which resulted in taking from the defendants the management of the corporation interfered with their performance of the contract with the plaintiff is sufficiently answered by the fact that the action of the state was founded solely on the misconduct of the defendants as managing agents. *Morawetz on Corp.*, 1016. The defendants should have foreseen and prevented these consequences. Proper management would have averted them and rendered state or private interference or loss of control impossible. In this aspect of the case reference may be made to another rule, which holds that where performance of a contract is rendered difficult, or even impossible, by the act of the party who is chargeable therewith, such impossibility furnishes him with no defence to an action founded on the obligation *Chitty, supra*, § 1079 ; *Woolner v. Hill*, 93 *N. Y.*, 576. The action was brought by the state, and Lorillard was subsequently joined as co-plaintiff by consent. His presence added no force to the proceeding. He did not seek or obtain any personal relief, nor could he receive any in that action. The judgment did not pass on his legal rights under the contract in suit, and nothing was adjudicated against him. The fact that the plaintiff encouraged the state to assert its rights against the defendants and indemnified its costs did not turn that litigation into one of his own. Lorillard could gain no personal advantage by that litigation, and he suffered no pecuniary loss from it. The state was asserting a sovereign right in an action which it alone could maintain, and joining a private individual as co-plaintiff or relator neither impaired nor enlarged the scope of the proceeding. If the litigation had been one calculated to transfer the management of the corporation from the defendants to

the plaintiff, or if Lorillard had been joined as defendant, and had, with the other defendants, been adjudged guilty of the wrongs committed, the judgment in that proceeding might have had some significance, but that is not this case. If the plaintiff's contract had been with the corporation, its dissolution might, perhaps, have terminated it. Corporations are born of the state and may die by expiration of charter, or by annulment, or dissolution. At common law the assets of a dissolved corporation reverted to the Crown, and the debts due by it were canceled. 2 *Kent's Com.*, 307; *Angell & Ames on Corp.*, 667. The statute changed this inequitable principle by declaring that on the dissolution of a corporation, the directors or managers thereof (unless some other person be appointed by the legislature or the court) shall be trustees of the creditors and stockholders. 2 *R. S.*, 7th ed., p. 1531, § 9. So that, although the corporation may die, its estate is to be administered in practically the same manner as the estate of any natural person. The expiration of the charter does not terminate the corporate existence in such a sense as to prevent an action in the corporate name by its sole surviving director to establish its rights of property for the benefit of stockholders. *Taylor v. Holmes*, 127 *U. S. R.*, 489. Nor does a lease to the corporation terminate by its dissolution. *People v. Trust Co.*, 82 *N. Y.*, 283. The case of the *People v. Globe M. L. I. Co.*, 54 *How.*, 240, *aff'd* 91 *N. Y.*, 174, was a contract for personal services which, in its nature, was terminable on the death of either of the contracting parties. And so *People v. O'Brien*, 111 *N. Y.*, 54. But it is idle to discuss what effect the death of the corporation would have produced if the contract would have been made with it, or made dependent on its continued existence. The contract was entered into by the defendants on their own behalf; was not dependent on continued corporate life for vitality or energy, and nothing within the range of possibility ex-

cuses its performance. *Beebe v. Johnson*, 19 *Wend.*, 500; *Harmon v. Bingham*, 12 *Ib.*, 99; *Booth v. Spuyten D. R. M. Co.*, 60 *N. Y.*, 487. This principle was settled as far back as *Paradine v. Jayne*, given us by the old reporter, *Alleyn*, in 23 *Charles II.* The defendant there had taken a lease, covenanting to pay rent. He pleaded that a certain German Prince by the name of Prince Rupert, an alien born enemy to the King and Kingdom, had invaded the realm with a hostile army of men, and with the same force had entered upon the defendant's possessions and him expelled, whereby he could not take the profits. On demurrer the court resolved that the matter of the plea was insufficient, and that he ought to pay his rent; and this difference, says *Alleyn*, was taken, that when the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; but where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. This was then, has ever since been, and is now the law. The obligation the plaintiff seeks to enforce was not created by the law, but by the voluntary act and contract of the parties, and the strict rule in regard to literal performances is applicable. A number of cases affirming the principle stated will be found collated in 2d *Smith's Leading Cases*, 8th ed., 39. If inexorable impediments lie in the way of performance and a loss must ensue, the law leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated. To do otherwise would be to make the construction of a contract depend, not upon the intention of the parties when it was

entered into, but upon the incidents of the future. *Vide* Smith, *supra*, pp. 40, 41. The exceptions to the rule are clearly stated in *Dexter v. Norton*, 47 *N. Y.*, 64–65, and apply only where the parties contemplated the continued existence of the particular person or thing which is the subject of the contract, and such person or thing is, without the fault of either party, rendered incapable of answering the purpose of the contract, as in the case of a particular musical hall destroyed by fire (3 *B. & S.*, 286); the sale of a certain horse to be delivered at a future day and the horse died in the interval. *Benjamin on Sales*, 424; *Carpenter v. Stevens*, 12 *Wend.*, 589. In the case of an apprentice who became permanently ill, and of a woman who, from illness, was unable to perform as a pianist (4 *C. P.*, 1 *L. R.*, 6 *Ex.*, 269, *L. R.*), it was unnecessary to guard expressly against these contingencies, for they were excepted from the very nature of the undertaking. To come within the rule excusing performance, the incapacity to perform must be involuntary and without fault. In the cases put had it appeared that the hall had been destroyed or the horse killed by the negligent act of the promisor, he would have been clearly liable to make good all loss for not furnishing the thing agreed. So if the illness of the apprentice or sickness of the pianist had been caused by their own misconduct neither would have been excused from responding to damages. The law reasons and acts upon sound logical principles and considers causes in determining effects, for the legal consequences flowing from one spring may not flow from another. The case at bar, though near the border line, rests securely on that side which finds recognition in the general rule stated, and does not reach into or invade that domain where the principle illustrated by the exception finds application. Here the administration of the corporate franchise was the direct result of wrongful conduct on the part of the defendants in their management of the property intrusted to their care

and control. This circumstance affects largely the legal result of the question submitted for decision. Suppose the defendants had wrongfully created corporate liabilities on which judgments had been recovered against the corporation, or had by some neglect allowed the vessels of the line to be libeled, and the management had in consequence passed from them to strangers under execution, or marshal's sales of the corporate property. Could it have been seriously contended that such a change in the condition of things would have furnished the defendants with any legal excuse for not performing their contract with the plaintiff? Certainly not. The plaintiff had \$150,000 of his capital invested in the enterprise, and apart from the question of stipulated profits, which were incidents merely, he was interested in having the management conducted within the limits of the law, and had a right to call the attention of the state to any infraction of the charter which imperiled his capital, and this without impairing any of his legal rights, remedies or collateral obligations against those guilty of the wrongs the state attempted to right. The fact that the proceeding was instituted on information imparted by the plaintiff can have no other effect than if the facts communicated had been given by a stranger. The attorney-general was charged with a public duty, and how or from whom he obtained the information upon which he acts is matter of little concern, so long as the information proves true and the proceeding results successfully to the state. Much of the fault found with corporations is their increasing tendency to extend their operations beyond their organic purpose. They are mere creatures of the law. Their rights and liabilities are defined by it, and it becomes the duty of the state to keep them within the limits of the powers conferred. A corporation organized to manufacture cannot engage in shipping, banking, insurance or railroading. Nor can corporations chartered for either of these specific pur-

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Opinion of McADAM, J.

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poses engage in enterprises foreign to the object of their creation. Corporations are given especial privileges, not to favor those to whom the franchises were granted, but with a view to the advantages that may accrue to the public, as in this instance from facilities afforded for travel and the movement of trade and commerce. The state is, as to domestic rights and corporations, a sovereign power. It may, through want of knowledge of an infraction of its laws, or from indifference, tolerate trivial transgressions, for toleration is not licence; but when it is called upon to right wrong, its authority is more far-reaching than many at times contemplate. This attribute of the state is to be exercised whenever the public good requires its interference, and it matters not who awakens it to its sense of duty. The people are the sequestrators, not the informant through whose agency the machinery is put in motion. Nor are the motives of the informer of any moment so long as the end justifies the means and the legal result is established which approves the action of the state in the premises. Motives can never make that wrong which in its own essence is lawful. It may be a misfortune to the defendants that they lost the source from which they expected to realize the moneys promised to the plaintiff, but after the court, in an action to annul the charter, determined that this individual misfortune was necessary to the public good, it is idle to dwell upon this phase of the case with solicitude. The efforts to prove that the plaintiff was a participator in the wrongs adjudicated to have been committed by the defendants have failed, and as a result he stands free from whatever legal consequences might have followed if he had been *particeps criminis* with them. There are cases in the books (and among them *Hollingshead v. Woodward*, 107 *N. Y.*, 96; *Sturges v. Vanderbilt*, 73 *Ib.*, 390; *Munna v. Potomac Co.*, 8 *Peters*, 281; *Reade v. Frankforth Bank*, 23 *Maine R.*, 321), holding that the dissolution of a corporation is its death; that parties

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Opinion PER CURIAM.

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dealing with it contract with reference thereto; that no judgment can thereafter go against it; that a stockholder therein ceases to be such, so far as exemption from corporate penalties is concerned; but a discussion of the reasons for these decisions is unnecessary, because the principles decided do not reach the issues presented by the present record. For the same reason it is unnecessary to consider the rule that where an act is done by public authority which renders further performance of a contract impossible, the contract is dissolved. *Melville v. DeWolf*, 82 *E. C. L. R.*, 842; *Jones v. Judd*, 4 *N. Y.*, 411; *Hildreth v. Buell*, 18 *Barb.*, 107. The contract was not made with the corporation, nor was it dependent on its continuation for support. There is no defence to the action, and the plaintiff is entitled to judgment for \$33,757.50, the amount claimed, and interest."

*Boardman & Boardman*, attorneys, and *James C. Carter*, *William N. Dykman* and *Edwin C. Boardman* of counsel, for appellants.

*Glover, Sweezy & Glover*, attorneys, and *Richard L. Sweezy* and *Asa Bird Gardiner* of counsel, for respondents.

PER CURIAM.—The judgment appealed from is affirmed, with costs, on the opinion of the court below.

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Appellant's points.

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JACOB K. HETSCH, APPELLANT v. T. BRIGHAM  
BISHOP, RESPONDENT.

*Order of arrest, exception to the sufficiency of bail and proceedings thereon.*

*Held*, that this order cannot be sustained. The plaintiff had not waived his right to the examination of the sureties, but had proceeded regularly to enforce it.

Before FREEDMAN and GILDERSLEEVE, JJ.

*Decided December 5, 1892.*

Appeal from an order denying plaintiff's motion to compel the sheriff of New York to accept a notice of exception to the sufficiency of bail given by defendant, and providing further that if the plaintiff decline to permit the approval of the sureties to stand, that the order of arrest should be considered vacated.

*Myer J. Stein*, for plaintiff-appellant, argued:—

I. Plaintiff either was or was not absolutely entitled to the justification of the sureties. There was no question of discretion involved. It has always been supposed hitherto, that when a defendant gave bail in the sheriff's office, and the sheriff caused a copy of the bail-bond to be served on the plaintiff's attorney, and such attorney served a notice of exception within the statutory time, that under such circumstances, he had the absolute right to have the sureties justify in open court and to have the question submitted to the court, as to their sufficiency, and be heard as to the sufficiency of the form of the undertaking. *Code*, §§ 573, 581. The notice of exception served on the sheriff in this case was not only to the

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Appellant's points.

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sufficiency of the sureties but to the form of the undertaking. The sheriff's counsel recognized the right of plaintiff to except to the sureties and to the justification by serving the undertaking. If he intended to rest upon the *ex parte* approval of the undertaking by the judge he should not have served copy of the bail-bond. Having done this, he is estopped now from claiming that the plaintiff had no right to except to the sufficiency of the sureties and to the form of undertaking. This undertaking was served by the sheriff's attorney upon plaintiff's attorney on June 1, 1892. On that day a notice of exception was duly served, and on the same day it was returned, because it had already been approved by the court. This was taking the position that the matter was at an end, and that the plaintiff had no rights in the premises. The plaintiff either had the absolute right to except to these sureties and have his notice of exception stand and have them justify in open court under the provisions of the Code, which we have cited, or he had no rights whatever. Section 572 of the Code provides that it is not necessary that the undertaking should be approved or accompanied by an affidavit of justification of the bail, but that the officer taking the acknowledgment of the undertaking must, if the sheriff so requires, examine under oath, to a reasonable extent, the bail, concerning their property and circumstances, and if this is done, that it must be reduced in writing, subscribed by them, and annexed to the undertaking. This is largely formal and was done in the present case by the commissioner of deeds connected with the sheriff's office. Section 577 provides that within three days after the bail is given, the sheriff must deliver to the plaintiff's attorney copies certified by him of the order of arrest, warrant and undertaking, and that such attorney, within ten days thereafter, must serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted them,

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and the sheriff is exonerated from liability. Section 578 provides that within ten days after the receipt of the notice, the sheriff or the defendant may serve upon plaintiff's attorney notice of justification of the bail or other bail, specifying places of residence and occupation of each of the latter, before a judge of the court, or a county judge, at a specified time and place. Section 579 provides that the bail must be residents of and householders or freeholders within the state. Section 580 provides that for the purpose of justification, each of the bail must attend before the judge at the time and place mentioned in the notice and be examined on oath on the part of the plaintiff touching his sufficiency, in such manner as the judge in his discretion thinks proper, and that the judge may adjourn the examination from day to day, and if required by the plaintiff's attorney, the examination must be reduced to writing and subscribed by the bail. Section 581 provides that if the judge finds the bail sufficient, he must annex the examination to the undertaking, endorse his allowance thereon, and cause the same to be filed with the clerk, and that the sheriff is thereupon exonerated from liability. It would seem that these provisions are too plain to admit of any cavil, and provide that if an exception to bail is duly served by the plaintiff, he has the right to have the parties appear in court and to examine them, and if they are found sufficient, then and not till then can they be approved by the court, and then and not till then is the sheriff released from liability, as bail. In this case, it is not claimed that the plaintiff made any waiver of his rights. In fact, as soon as the bail bond was served upon him, he took prompt action, excepted to the sufficiency of the sureties and to the form of the undertaking, and as soon as this notice was returned, he promptly made his application to the court. There is no provision in the Code which we have been able to find, which permits a judge to take away the

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Appellant's points.

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right of the plaintiff to examine bail. Of course, we can all conceive of a situation where the plaintiff might come before the court asking a favor of some kind and the court could then order that as a condition of granting the relief, the plaintiff should waive his right to examine the sureties, but there is nothing of that kind in this case. That the right of arrest and to hold to bail is a substantial one, is beyond question. The taking away of this, affects a substantial right of a litigant. *Levy v. Salomon.*, 105 *N. Y.*, 520, 533.

II. If the application rested in the discretion of the court, it is then respectfully submitted that this is a case where the discretion should have been exercised in favor of the plaintiff. The action was one in which his Honor, Judge McADAM, granted the order of arrest, and after an examination of facts, which have never been disputed, held that it was a proper case for arrest, and fixed the bail at the sum of three thousand (\$3,000) dollars. The papers presented show that it is an aggravated case. The defendant fled the jurisdiction when under arrest in the City Court action, gave fraudulent bail, which was rejected by the court, and when execution was issued against his person he was not to be found. That action, which was one of conversion, resulted in a judgment against him, which has not been paid. Shortly after, when he was finally surrendered by one of his bail, he turned around and from motives which are perfectly plain, swore out a warrant for the arrest of the plaintiff in this action for perjury and dragged him through a lengthy examination before a police judge and obtained the matter to be widely advertised in newspapers. The defendant, when arrested in this action, claimed that he was unable to give bail in the sum fixed by the judge and the same was reduced to one thousand dollars. He was allowed to go in the custody of his counsel, and then refused to surrender to the sheriff, and only did so after a motion had been made to punish his attorney for

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Appellant's points.

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contempt. He then gave an undertaking with two sureties (relatives) upon the same, who pretended to be residents of the city of New York. It appeared, however, that they were then actually living in New Jersey. Whether they were *bona fide* residents of New York might be a question open to discussion. At least, that was one of the questions which the plaintiff believed he had the right to inquire into and discuss before the court. One of the pieces of property given by the defendant's wife was mortgaged. Its value was problematical. The balance of the security given by her was personal property, which is always of a very illusive nature when an attempt is made after litigation to realize. The other surety, a son of defendant, pretended that he was a resident of the city of New York, although actually living in New Jersey at the time, and he gave some suburban property in Brooklyn as security, and also illusive personal property. These persons living in New Jersey would no doubt have been very difficult to find, if an attempt was ever made to subject them to a liability as bail. Under these circumstances, and knowing the defendant's record, that he had fled the jurisdiction, and finally, was surrendered by one of his bail, it was perfectly natural that the plaintiff's attorney should desire to examine the bail, in this action, and it would seem that under the state of facts disclosed, that if it were a matter resting in the wise judicial discretion of the judge, that he should have permitted such examination. We all know that a formal affidavit of justification, made without the opportunity for cross-examination by the adverse party, amounts to little. The affidavits of the sureties, taken in the sheriff's office, were so made. The learned judge, in approving the same, probably did so, as a matter of form, and possibly may have understood at the time that they were satisfactory to the plaintiff, although no stipulation or proof was presented to him to that effect. It would seem, at least,

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Respondents' points.

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that on his attention being called to the facts to which we have referred, that he should have been only too glad to have given the plaintiff an opportunity to examine the sureties in open court and test their responsibility. The motion before the court was to compel the sheriff to accept service of the notice of exception, and vacate the *ex parte* approval of the bail. It is respectfully submitted that the court should have been content with either denying or granting the motion and should have stopped there.

III. In any event, that portion of the order which goes beyond a denial of the motion should be stricken out. It is respectfully submitted that the portion of the order in this language should be stricken out and the order modified accordingly. "If the plaintiff declines to permit the approval of the sureties to stand, the order of arrest granted by Mr. Justice McADAM may be considered vacated."

*William E. Stillings*, for the sheriff, in opposition, argued:—

I. Whilst the Code gives the plaintiff a right to an examination of the sureties on a bond or undertaking, the court undoubtedly has a right to control its mandates and any proceeding which grows out of the issuing thereof, and if the court exercises that right by approving a bond or undertaking, plaintiff must accept such approval, whether it is satisfactory to him or not. If the sureties had attended before a justice of this court pursuant to a notice to appear and justify, and their examination had been taken and their testimony did not disclose sufficient property owned by them to qualify as sureties, as provided by the Code, and the justice before whom such justification was had should deem them sufficient and approve the bond or undertaking, such approval would be final. The Code, section 580, reads as follows: "For the purpose of justification, each of the bail must

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Respondent's points.

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attend before the judge at the time and place mentioned in the notice, and be examined on oath on the part of the plaintiff, touching his sufficiency in such manner as the judge in his discretion thinks proper. If required by the plaintiff's attorney, the examination must be reduced to writing and subscribed by the bail." Section 582 says, if the judge finds the bail sufficient, he must annex the examination to the undertaking, endorse his allowance thereon and cause them to be filed with the clerk. It is clearly left to the discretion of the judge to decide whether the bail is sufficient. A justice has an undoubted right to vacate an order of arrest upon any grounds, and certainly as in this case, the judge who grants the order of arrest can vacate it. All that is necessary is that the justice shall deem it proper to do so. That being so, it follows that the justice who issued the order of arrest in this case may vacate it or impose as a condition for not vacating it any stipulations or requirements he wishes. In this case the learned judge imposed as a condition for not vacating the order of arrest that the plaintiff or his attorney shall not insist upon an examination of the sureties.

II. The justice who issued the order of arrest having power to vacate it and having by his decision ordered that the order of arrest be vacated unless the approval of the sureties is allowed to stand, and the plaintiff by his appeal herein having manifested his choice not to let said approval stand, the only result of this appeal, even if this court should hold that plaintiff was entitled to an examination of the sureties, would be an affirmance of that part of the order which vacated the order of arrest.

III. But if the learned justice erred in approving the bond before plaintiff had examined the sureties, the sheriff should not be prejudiced thereby. The court should protect its executive officers in carrying out its mandates. After a justice of this court had approved the bond, the sheriff had no alternative but to allow the

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Opinion of the Court, by FREEDMAN, P. J.

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defendant to go from his custody. And by the order appealed from, the learned justice has clearly manifested that it was right and proper, in his opinion, that the bond should be approved and so stand. If the court should now reverse the order of Mr. Justice McADAM and decide that defendant's sureties must submit to an examination, it would in effect decide that the bond should never have been approved before plaintiff had examined said sureties, and that the defendant should not have been allowed to go from the custody of the sheriff until the bond had been approved after an examination. But if the sheriff should not be able to retake the defendant and the sureties on the bond should prove worthless, perhaps having become so since said approval, the sheriff might be mulcted in damages to the amount of the bond. It would be unjust and inequitable that an executive officer should be made to suffer for doing his duty, and even if the court should take the view that plaintiff has been deprived of some right, it should not seek to give him relief at the expense of a public officer who has simply discharged his duty.

BY THE COURT.—FREEDMAN, J.—The material facts to be considered on this appeal are as follows :—

The action is for malicious prosecution. On the 26th of May, 1892, the defendant was in the custody of the sheriff under and in pursuance of an order of arrest theretofore granted in the action which requires the sheriff to hold him unless he gave bail in the sum of \$1,000. On the day named the defendant did give such bail to the sheriff. The undertaking delivered for that purpose was executed by the wife and the son of the defendant, as sureties, who therein claimed that they were permanent residents of the city of New York, although they then temporarily resided at Clifton, N. J. Each of the sureties made an affidavit of justification before a commissioner of deeds in the office of the sheriff. The sher-

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Opinion of the Court, by FREEDMAN, P. J.

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iff thereupon released the defendant from custody. On May 26, 1892, the undertaking was approved *ex parte* by a judge of this court. On June 1 the sheriff served a copy of the undertaking upon the attorney for the plaintiff, and upon the same day the said attorney duly served upon the sheriff and upon defendant's attorney notice of exception to the sufficiency of the undertaking and of the sureties. This notice was returned by the sheriff to plaintiff's attorney, with a notice to the effect that the return of the notice of exception was for the reason that the undertaking, and the sureties thereon, had been approved by a judge of this court before the receipt of the notice of exception. Thereupon the plaintiff's attorney, upon an affidavit showing the facts, and alleging that he had not examined the sureties or consented to the approval of the undertaking, that he believed the sureties to be insufficient, and that the defendant would probably escape, and insisting upon his right to examine the sureties, moved that the sheriff be compelled to receive the notice of exception and that the *ex parte* approval of the undertaking be canceled. After a hearing this motion was denied and an order entered denying the same and providing further, that if the plaintiff should decline to permit the approval of the sureties to stand, the order of arrest might be considered vacated. From this order the plaintiff appealed.

This order cannot be sustained. The plaintiff had not waived his right to the examination of the sureties and had proceeded regularly to enforce it. The *ex parte* approval of the undertaking was not necessary under section 576 of the Code of Civil Procedure, and as it was without any notice to the plaintiff or his attorney, it was, to say the least, merely formal and did not bind the plaintiff. Under section 577 the sheriff was bound to serve a certified copy of the undertaking upon plaintiff's attorney, and the latter had ten days thereafter to serve notice that he did not accept the bail. Such notice

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Opinion of the Court, by FREEDMAN, P. J.

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having been duly and immediately given, it became the duty of the sheriff or the defendant, under section 578, to serve notice of justification before a judge of the court, and under section 580 the sureties should have attended pursuant to such notice for the purpose of justification and submitted to an examination by plaintiff's attorney touching their sufficiency. The manner of the examination is in the discretion of the judge, but, if required by the plaintiff's attorney, the examination must be reduced to writing and subscribed by the bail. It is only upon the conclusion of such an examination that the contested sufficiency of the bail is to be finally determined, and if then the judge finds the bail sufficient, he must, under section 581, annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk, and thereupon, and not before, the sheriff is exonerated from liability. The language of the section last referred to is too plain to admit of dispute.

For the reasons stated the order appealed from should be reversed, with ten dollars costs and disbursements, and the motion granted.

GILDERSLEEVE, J., concurred.

FREDERICK L. DEGENER, RESPONDENT v. JOHN  
T. UNDERWOOD, ET AL., APPELLANTS.

*Trial before referee—Effect of order of reference entered before service of amended answer and notice of trial—Waiver of objection by going on with trial instead of moving to vacate proceedings.*

After the issues herein were referred to a referee, the defendants served an amended answer to which plaintiff served a reply. No notice of trial was served after issue joined on the amended answer. The defendants objected to proceeding before the referee at the opening of the trial, on the ground that the issues to be tried were not made until a date subsequent to the order of reference. The referee proceeded with the trial and rendered a report in the plaintiff's favor. *Held*, that defendants were debarred from raising this question by their own laches in not seeking relief by motion to vacate the order of reference and proceedings held before the referee, prior to the presentation of their defence.

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided December 5, 1892.*

Appeal by defendants from a judgment entered upon the report of a referee in plaintiff's favor. The action was brought to recover a certain balance alleged to be due plaintiff for services and materials furnished in the construction of a machine for making manifolding paper. Further facts appear in the head-note.

*James A. Hudson*, for appellants.

*J. E. Ludden*, for respondent.

BY THE COURT.—DUGRO, J.—There is authority for the proposition that where a defendant appears and makes a defence, a new trial will not be granted because of a failure to give notice of trial (*Yonge v. Fisher*, 2

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Opinion of the Court, by DUGRO, J.

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*Dowl. N. S.*, 637 ; *Doe D'Antrobus v. Jepson*, 3 *B. & A. D.*, 402 ; *Thermolin v. Cole*, 2 *Salk.*, 646 ; see 3 *Wait's Pr.*, 31 and 397 ; *Rumsey's Pr.*, vol. 2, page 405) ; but regardless of this, it is quite certain that the appellants should be held to be debarred from now raising any question as to the service of a notice of trial, because of their laches in not seeking relief by motion to vacate the proceedings had before the referee prior to the presentation of their defence.

By the order of July 9, the clerk was directed to enter judgment as of the 9th day of April, 1891. The judgment thus to be entered was for the sum found by the referee, with interest thereon from April 2 to April 9, and the costs and disbursements, in all \$40.53, less than the amount of the judgment entered by the clerk. The entry of the judgment should be corrected accordingly. A careful examination of the case discloses no error requiring a reversal. The judgment, entered as ordered, to be corrected, is affirmed, with costs.

FREEDMAN, P. J., and GILDERSLEEVE, J., concurred.

**MEMORANDA**  
**OF**  
**CASES NOT REPORTED IN FULL.**

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**WILLIAM A. HAGGERTY, APPELLANT v. JAMES J.  
PHELAN, RESPONDENT.**

*Amended answer, terms on which leave to serve same should be granted.*

*Where a demurrer was sustained to a portion of the answer with leave to amend upon payment of costs within a time specified, defendant paid costs but neglected for nearly a year to serve such amended answer, and when the cause was about to be reached for trial moved to be relieved from his default and to be allowed to serve such amended answer which motion was granted on payment of twenty dollars additional costs. Held, that the order should also have imposed as a condition, the payment of the accrued term fees, and order modified accordingly.*

**Before SEDGWICK, Ch.J., FREEDMAN and McADAM, JJ.**

*Decided May 2, 1892.*

**Appeal from order allowing defendant to serve an amended answer on terms, his time to do so having long expired.**

*Charles M. Hall, for appellant.*

*Samuel E. Duffey, for respondent.*

**PER CURIAM.**—Order modified by imposing payment of fifty dollars accrued term fees in addition to the costs provided in the order, and, as modified, affirmed without costs of appeal.

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Statement of the Case.

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**ELLA M. SEYBOLD, RESPONDENT v. WILLIAM BOSTELMANN, APPELLANT.**

*Agency—When party lending money may be the disbursing agent of the debtor—Plaintiff at defendant's request advanced certain moneys to aid in the prosecution of a certain enterprise in which defendant was interested. Some of the money was paid by check to plaintiff's husband who was defendant's agent in charge of the work. The remainder was paid directly at the oral request of the agent in charge to discharge obligations incurred in the prosecution of the work. Held, that the only question was as to advances not made by check drawn to the order of the agent in charge, but made to others at his request. As to such payments, plaintiff may be regarded as the disbursing agent of defendant. To have first put the money in the hands of the agent in charge would have been a mere ceremony.*

Before SEDGWICK, Ch. J., and McADAM, J.

*Decided May 2, 1892.*

Appeal by defendant from judgment entered on a verdict in favor of plaintiff, and from an order denying motion for a new trial. The action was brought to recover money advanced by plaintiff to defendant.

*James Demarest, attorney, and L. Laflin Kellogg of counsel, for appellant.*

*A. G. N. Vermilya, for respondent.*

The Court held (PER CURIAM), as stated in the head note. Judgment and order affirmed, with costs.

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**EDWARD BREARTON KINSELLA, APPELLANT v. THE SECOND AVENUE RAILROAD COMPANY, RESPONDENT.**

*Action for negligence—Examination of plaintiff before trial. Order for same should restrict examination to questions as to the time when*

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Statement of the Case.

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*and the place where the alleged accident occurred and as to residence of plaintiff at the time of the accident.*

Before SEDGWICK, Ch. J., and McADAM, J.

*Decided May 2, 1892.*

Appeal by plaintiff from order denying a motion to vacate an order requiring plaintiff to submit to an examination before trial. The action was for personal injuries caused by the alleged negligent management of one of defendant's street cars, whereby plaintiff was run over by the horses attached thereto while crossing the street.

*W. Bourke Cockran*, attorney, and *Wales F. Severance* of counsel, for appellant.

*Merrill & Rogers*, attorneys, and *Jason Hinman* of counsel, for respondent.

PER CURIAM.—Order modified as indicated in head note, and as modified, affirmed without costs.

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LOUISE LANGE, RESPONDENT v. THE MANHATTAN RAILWAY COMPANY, ET AL., APPELLANTS.

*Trial—Defendants should not be allowed to prove their defence on the cross-examination of plaintiff before plaintiff rests.*

Before DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

Appeal by defendants from judgment entered upon verdict in plaintiff's favor and from an order denying motion for a new trial. The action was brought to

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Statement of the Case.

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recover damages to the use of plaintiff's premises caused by the maintenance and operation of defendants' elevated railroad in sixth avenue in front thereof.

*Davies, Short & Townsend*, for appellants.

*Byram L. Winters*, attorney, and *Edward S. Clinch* of counsel, for respondent.

The Court (DUGRO, J., writing, GILDERSLEEVE, J., concurring) affirmed the judgment and order, with costs.

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THOMAS S. CLARKSON, ET AL., APPELLANTS v.  
FREDERICK S. HOWARD, RESPONDENT.

*Broker's Commission*—Where several brokers are endeavoring to sell the same property, the one effecting the sale only is entitled to the commission. The mere fact that one of the unsuccessful brokers first introduced the principals does not establish his right to recover. *Alden v. Earle*, 56 Super. Ct. Rep., 366 ; 121 N. Y. 688, followed.

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

Appeal by plaintiffs from judgment entered upon a verdict directed by the court in favor of defendant. The action was brought to recover broker's commissions for selling defendant's house. It was established on the trial that the sale was effected to the same proposed purchaser by another broker.

*Ogden, Beekman & Ogden*, for appellants.

*Cannon & Atwater*, for respondent.

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Statement of the Case.

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The Court held (PER CURIAM) as stated in head note. Judgment affirmed, with costs.

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THOMAS S. BASSFORD, RESPONDENT v. CHARLES  
H. WHITE, APPELLANT.

*Contract for attorney's services—Compensation based upon results of litigation—Measure of damages where retainer of attorney is revoked by client before services are completed. Plaintiff was retained by defendant in certain street opening proceedings affecting defendant's premises, to diminish the assessment and increase the award, plaintiff to receive one-fourth of the amount saved, as contingent compensation. After plaintiff had taken certain steps, but before the hearing by the commissioners, defendant revoked plaintiff's authority and employed another attorney. Held, that plaintiff was entitled to recover one-fourth of the amount saved to defendant by the proceedings, being the agreed compensation, less the fair value of the services and disbursements necessary to complete the plaintiff's undertaking, after his authority was revoked.*

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

Appeal by defendant from judgment entered in favor of plaintiff upon the decision of a judge after trial of the issues without a jury. The action was to recover the contract price of certain legal services which plaintiff agreed to render, but was prevented from fully performing the same by the revocation of his authority by defendant prior to the completion of the legal proceedings in question.

*James C. De La Mare*, for appellant.

*Ernest Hall*, for respondent.

The Court (PER CURIAM) approved the rule of damages applied by the trial court (MCADAM, J.) as stated in head note. Judgment affirmed, with costs.

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Statement of the Case.

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**ANNIE BARRETT, AN INFANT, BY GUARDIAN, ETC.,  
RESPONDENT *v.* GEORGE WALDO SMITH, ET AL.,  
APPELLANTS.**

*Evidence—Negligence. Proof of subsequent admissions by witness, the servant of defendants, denied on cross-examination, and inconsistent with direct testimony, when competent. In an action for personal injuries caused by the alleged negligent management of defendants' truck whereby plaintiff was run over at 108th street and 4th avenue, the driver testified in behalf of defendants that no unusual accident was brought to his attention except when he was arrested. He was arrested at 125th street and denied, on cross-examination and over objection by defendants, having asked the police officer "Is this the 108th street racket?" Held that the testimony of the police officer in rebuttal that the driver asked said question was competent.*

**Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.**

*Decided July 5, 1892.*

Appeal by defendants from a judgment entered upon a verdict in plaintiff's favor and from an order denying a motion for a new trial.

*James A. Seaman, for appellants.*

*Richard O'Gorman, Jr., for respondent.*

**PER CURIAM.**—Judgment and order affirmed, with costs.

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**THE PEOPLE, ETC., EX REL. MICHAEL G. MINCHEN,  
RELATOR, APPELLANT *v.* CHARLES F. MACLEAN,  
ET AL., COMMISSIONERS, ETC., RESPONDENTS.**

*Certiorari to review proceedings of police commissioners. Where the writ directs the commission to certify all the acts and proceedings sought to be reviewed, it will be presumed from the absence of the*

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Statement of the Case.

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*statement in the return that it contains all of such acts and proceedings, and from the fact that the judgment of the commissioners in the case is not referred to in the return, that all the acts of the Board have not been returned and a further return containing such statement with other proper matter should be directed.*

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided July 5, 1892.*

Proceedings by writ of certiorari to review judgment of the police commissioners removing relator from the police force.

*Louis J. Grant*, for relator, appellant.

*William H. Clark*, counsel to the corporation, for respondents.

BY THE COURT.—DUGRO, J.—Return remanded for correction in the particulars stated in the head note.

FREEDMAN, P. J., and GILDERSLEEVE, J., concurred.

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THOMAS BOLGER, RESPONDENT v. THE METROPOLITAN ELEVATED RAILWAY COMPANY, ET AL., APPELLANTS.

*Easements taken by elevated railroad—Valuation thereof by trial court will be reviewed by general term and if not sustained by the evidence, the injunction may be modified by suspending its operation for a reasonable time to enable the defendants to take condemnation proceedings. Blumenthal v. N. Y. Elevated R. R. Co., 42 N. Y. State Rep., 683 followed. Judgment also modified by deducting from the money part thereof so much of the extra allowance as was based on the sum fixed as the valuation of the easements.*

Before FREEDMAN, P. J., DUGRO and GILDERSLEEVE, JJ.

*Decided October 24, 1892.*

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May 2, 1892.

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Appeal by defendants from a judgment entered upon the decision of a judge at special term in plaintiff's favor. The action was brought to secure an injunction and incidental damages with respect to defendants' elevated railroad in First avenue in the city of New York upon which plaintiff's premises abutted. The trial court fixed the alternative to the injunction or "fee damage" at \$3,500. The general term found that the evidence was not sufficient to justify a finding of more than \$3,000, but that substantial damage was shown.

*Davies, Short & Townsend*, for appellants.

*E. B. & C. P. Cowles*, for respondent.

PER CURIAM.—Judgment modified as indicated in head note and, as modified, affirmed without costs of the appeal to either party.

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JOHN E. AHRENS, Respondent *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY, *et al.*, Appellants.

Decided May 2, 1892. Appeal by defendants from judgment entered upon the report of a referee in favor of plaintiff. Davies & Rapallo, attorneys, and John S. Wood of counsel, for appellants. Edwin M. Felt, for respondent. Before Sedgwick, Ch. J., Freedman and McAdam, JJ. The Court (McAdam, J., writing, Sedgwick, Ch. J., and Freedman, J., concurring,) held that the judgment should be affirmed, with costs.

FRANK WENNEMER, Respondent *v.* PHILIP BRAENDER, Appellant.

Decided May 2, 1892. Appeal by defendant from judgment entered upon a verdict in favor of plaintiff and from order denying a motion for a new trial.

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May 2, 1892.

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Bartlett, Wilson & Hayden, attorneys, and Philip L. Wilson of counsel, for appellant. Louis A. Wagner, attorney, and Lewis Sanders of counsel, for respondent. Before Sedgwick, Ch. J., Freedman and McAdam, JJ. Per Curiam. Judgment and order affirmed, with costs.

PETER MAGER, Respondent *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY, *et al.*, Appellants.

Decided May 2, 1892. Appeal by defendants from judgment entered upon the report of a referee in favor of plaintiff. Davies & Rapallo, for appellants. Sackett & Bennett, for respondent. Before Sedgwick, Ch. J., Freedman and McAdam, JJ. Per Curiam. Judgment affirmed, with costs.

ROSA SCHEIER, Respondent *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY, *et al.*, Appellants.

Decided May 2, 1892. Appeal by defendants from judgment entered upon the report of a referee in favor of plaintiff. Davies & Rapallo, for appellants. Sackett & Bennett, for respondent. Before Sedgwick, Ch. J., Freedman and McAdam, JJ. Per Curiam. Judgment modified by requiring delivery by plaintiff to defendants at the time of delivery of the conveyance described in the judgment, of a release of the property rights in question, executed by the holder of the mortgages existing upon the premises, and as modified affirmed without costs to either party.

GUSTAV ZIMMER, *et al.*, Respondents *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY, *et al.*, Appellants.

Decided May 2, 1892. Appeal by defendants from judgment entered upon the report of a referee in favor of plaintiffs. Davies & Rapallo, for appellants. Sackett

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May 2, 1892.

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& Bennett, for respondents. Before Sedgwick, Ch. J., Freedman and McAdam, JJ. Per Curiam. Judgment modified by requiring delivery by plaintiffs to defendants at the time of delivery of the conveyance described in the judgment, of a release of the property rights in question, executed by the holder of the mortgage existing upon the premises, and as modified affirmed, without costs to either party.

MARY L. JONES, *et al.*, Respondents, *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY, *et al.*, Appellants.

Decided May 2, 1892. Appeal by defendants from judgment entered upon the report of a referee in favor of plaintiffs. Davies & Rapallo, for appellants. Sackett & Bennett, for respondents. Before Sedgwick, Ch. J., Freedman and McAdam, JJ. Per Curiam. Judgment modified by requiring delivery by plaintiffs to defendants at the time of delivery of the conveyance described in the judgment, of a release of the property rights in question, executed by the holder of the mortgage existing upon the premises, and as modified affirmed, without costs to either party.

ELIZA A. BURGGRAF, *et al.*, Respondents *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY, *et al.*, Appellants.

Decided May 2, 1892. Appeal by defendants from judgment entered upon the report of a referee in favor of plaintiffs. Davies & Rapallo, for appellants. Sackett & Bennett, for respondents. Before Sedgwick, Ch. J., Freedman and McAdam, JJ. Per Curiam. Judgment modified by requiring delivery by plaintiffs to defendants at the time of delivery of the conveyance described in the judgment, of a release of the property rights in question, executed by the holder of the mort-

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May 2—July 5, 1892.

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gage existing upon the premises, and as modified affirmed, without costs to either party.

CLARK R. GRIGGS, Respondent *v.* MELVILLE C. DAY,  
*et al.*, as Surviving Executors, etc., Appellants.

Decided May 2, 1892. Appeal by defendants from order denying motion to strike from the judgment roll plaintiff's proposed findings of fact and conclusions of law, the report of the referee having been in the plaintiff's favor. William R. Bronk, for appellants. John McDonald, for respondent. Before Sedgwick, Ch. J., and McAdam, J. The court found that defendants' attorney had assented to the incorporation in the judgment roll of said proposed findings of fact and conclusions of law. *Per Curiam*. Order affirmed, with costs.

TOBIAS OBERFELDER, Respondent *v.* THE METROPOLITAN  
ELEVATED RAILWAY COMPANY, *et al.*, Appellants.

Decided May 2, 1892. Appeal by defendants from judgment entered upon decision of a judge at special term in the plaintiff's favor. Davies & Rapallo, attorneys, and Brainard Tolles of counsel, for appellants. E. B. & C. P. Cowles, for respondent. Before Freedman, P. J., and McAdam, J. *Per Curiam*. Judgment affirmed, with costs.

FLORA JACOBS, Appellant *v.* DAVID MORRISON, individually, etc., Respondent.

Decided July 5, 1892. Appeal by plaintiff from judgment entered upon the findings and decision of a judge at special term dismissing the complaint. Reeves & Todd, attorneys, and Ambrose G. Todd of counsel, for appellants. J. George Flammer, for respondent. Before Freedman, P. J., and Gildersleeve, J. Opinion

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July 5, 1892.

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by Freedman, P. J., holding that as the evidence was not printed in the record it must be assumed that the facts found were supported by the evidence and that the facts found justify the conclusions of law based thereon. Gildersleeve, J., concurred. Judgment affirmed, with costs.

**THE PEOPLE**, etc., *ex rel.* JOHN J. GILROY, Relator, Appellant *v.* CHARLES F. MACLEAN, *et al.*, Commissioners, etc., Respondents.

Decided July 5, 1892. Appeal by writ of certiorari by relator from judgment of the board of police commissioners dismissing him from the police force of the city of New York. Louis J. Grant, for relator, appellant. William H. Clark, counsel to the corporation, and William A. Sweetser of counsel, for respondents. Before Freedman, P. J., Dugro and Gildersleeve, JJ. Opinion by Dugro, J., Freedman, P. J., and Gildersleeve, J., concurred. Judgment of commissioners affirmed, and writ dismissed, with \$50 costs and disbursements.

GEORGE PEYSER, Respondent *v.* JOHN C. MCCARTHY, *et al.*, Appellants.

Decided July 5, 1892. Appeal by defendants from judgment entered upon a verdict in favor of plaintiff and from an order denying motion for a new trial. Henry D. Hotchkiss, for appellants. John Fennell, for respondent. Before Freedman, P. J., and Dugro, J. Opinion by Dugro, J., Freedman, P. J., concurred. Judgment and order affirmed, with costs.

**THE PEOPLE**, etc., *ex rel.* RUDOLPH GRANCHER, Relator, Appellant *v.* CHARLES F. MACLEAN, *et al.*, Commissioners, etc., Respondents.

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July 5—October 24, 1892.

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Decided July 5, 1892. Appeal by writ of certiorari by relator from judgment of the board of police commissioners imposing upon relator a fine of five days' pay. Louis J. Grant, for relator, appellant. William H. Clark, counsel to the corporation, for respondents. Before Freedman, P. J., Dugro and Gildersleeve, JJ. Per Curiam. Judgment of commissioners affirmed, and writ dismissed, with \$50 costs and disbursements.

HELENA L. G. ASINARI, Respondent *v.* CATHARINE REQUA, impleaded with others, Appellant.

Decided July 5, 1892. Appeal by defendant Requa from order overruling her answer as frivolous and directing judgment in favor of plaintiff thereon. P. Van Alstine, for appellant. Gillender & Stoiber, for respondent. Before Freedman, P. J., Dugro and Gildersleeve, JJ. Per Curiam. Order affirmed, with \$10 costs and disbursements.

WILLIAM S. VERNAM, *et al.*, Appellants *v.* EDWIN H. BAKER, Respondent.

Decided July 5, 1892. Appeal by plaintiffs from order staying the trial of the action. Robertsons & Harman, for appellants. Wing, Shoudy & Putnam, for respondent. Before Freedman, P. J., Dugro and Gildersleeve, JJ. Per Curiam. Order affirmed, with \$10 costs, etc.

DANIEL J. SPRAGUE, Appellant *v.* THE BARTHOLDI HOTEL COMPANY, Respondent.

Decided October 24, 1892. Appeal by plaintiff from so much of an order granting his motion to correct the judgment roll, as imposed as a condition the payment of the costs of the trial, which resulted in a dismissal

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October 24—December 5, 1892.

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of the complaint. J. Noble Hayes, for appellant. Nathaniel Myers, for respondent. Before Freedman, P. J., and McAdam J. Per Curiam. Order affirmed, with \$10 costs and disbursements.

**WORTHINGTON COMPANY, *et al.*, v. ROBERT AVERY.**

Decided October 24, 1892. Before Freedman P. J., McAdam and Gildersleeve, JJ. Per Curiam. Motion denied, without costs.

**FREDERICK SEGGERMAN v. NAPOLEON VALENTINE.**

Decided October 24, 1892. Before McAdam and Gildersleeve, JJ. Per Curiam. Motion denied, without costs.

**FREDERICK L. DEGENER, Respondent v. JOHN T. UNDERWOOD, *et al.*, Appellants.**

Decided December 5, 1892. Appeal by defendants from order granting plaintiff an extra allowance. James A. Hudson, for appellants. J. E. Ludden, for respondent. Before Freedman, P. J., Dugro and Gildersleeve, JJ. Opinion by Dugro, J., Freedman, P. J., and Gildersleeve, J., concurred. Order affirmed, with \$10 costs.

**FREDERICK L. DEGENER, Respondent v. JOHN T. UNDERWOOD, *et al.*, Appellants.**

Decided December 5, 1892. Appeal by defendants from order denying their motion to retax costs. James A. Hudson, for appellants. J. E. Ludden, for respondent. Before Dugro and Gildersleeve, JJ. Opinion by Dugro, J., Gildersleeve, J., concurred. Order affirmed, with \$10 costs.

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## ACCORD AND SATISFACTION.

The trial judge held in this case, that the plaintiff's intestate was guilty of contributory negligence in doing the work that he, as the apprentice of defendant, was called upon to do in his master's business; also that the payment of \$400 by defendant to Oscar Krause, one of the plaintiffs, might be considered a bar to the action. *Stuber v. McEntee*, 838.

## ACCOUNTING.

An agent cannot be allowed, for an amount paid by him, to compromise an action in which his principal and his principal's goods were affected, unless the agent establishes by evidence that he was specially authorized to compromise the same, or the nature of his agency clearly authorized him to so compromise such action and pay said amount. *Monnet v. Merz*, 120.

## ACTION.

Stay of proceedings in one action where two actions have been commenced, in both of which it is claimed the parties are the same, and the entire relief sought in the one case can be obtained in the other. *Held*, that the order of the special term, denying a stay, should be affirmed upon the

opinion of the judge thereof. *Smith v. College of St. Francois Xavier*, 363.

## AGENCY.

1. An agent cannot be allowed, for an amount paid by him, to compromise an action in which his principal and his principal's goods were affected, unless the agent establishes by evidence that he was specially authorized to compromise the same, or the nature of his agency clearly authorized him to so compromise such action and pay said amount. *Monnet v. Merz*, 120.
2. In an action to recover commissions claimed to be earned by plaintiff as a canvasser of the defendants' publications, the principal contention was the construction to be placed upon the words of the contract, which was oral. The plaintiff testified to the effect that in a conversation with the head of defendants' serial department it was agreed that he was to receive \$4 "an order for each order that he took" for the publications other than the cyclopedia and \$15 "an order" for the cyclopedia. Blank subscription papers were supplied by the defendants to the plaintiff who procured the signatures to the papers of a number of persons in Texas and Louisiana and forwarded the same by mail to the defendants. The plaintiff produced evidence tending to show that the subscription papers so signed were "orders"

within the meaning of the contract, upon acceptance of which he was entitled to the agreed commissions. The defendants contended that the expression "four dollars an order" had a well settled meaning in the business and was so understood by the parties to the contract, viz.: that the commission was to be regarded as earned only after the subscriber had taken and paid for two parts or numbers of the work subscribed for. The referee refused to find to this effect but did find that upon acceptance by the defendants of the orders, the commissions became due, and that defendants did so accept the orders. *Held*, that no error was committed by the referee in so ruling. If the referee erred in finding that the agreement in question was that the plaintiff should be paid when his orders were delivered to defendants and accepted by them, he only erred in finding that an acceptance by defendants was a part of the agreement, and such an error could not prejudice defendants. There was evidence that an order became a good order upon acceptance by defendants and such acceptance was shown, as in the present case, by the reception of the orders and entry thereof in the firm books. *Newhall v. Appleton*, 251.

3. Between June, 1866, and July, 1869, plaintiff made purchases and sales of stocks, securities and gold through the defendants, as brokers, and these dealings were managed and directed by Sanford, who gave all orders to defendants that were brought to their office by plaintiff's clerks or messengers, and defendants were constantly receiving cashier checks, drawn by W. H. Sanford, cashier, upon the plaintiff, which were paid by plaintiff in the usual course of business through the clearing house. The defendants received in such deal-

ings upwards of one hundred such checks, aggregating half a million of dollars, and no question or objection to the payment of these checks was ever made until July 1, 1869, when Sanford absconded after appropriating to his own use stocks, securities and moneys, of plaintiff and its customers. This action seeks to recover from defendants the amount of fourteen of the checks, selected out of the one hundred checks by plaintiff's counsel, on the ground that the money represented by these checks, and so paid to defendants, were for use in Sanford's private stock speculations, and that defendants knew actually or constructively what Sanford was doing. After Sanford's defalcation the plaintiff called upon defendants and was permitted to see Sanford's accounts, as kept by defendants, and then informed the latter that Sanford had been speculating on his own account. After receiving this information, defendants discovering certain balances in favor of Sanford with other brokers, they brought an action against him and recovered about \$2,000, by default, upon the theory that the transactions in question were with Sanford individually, and that he was their customer and not the plaintiff. Plaintiff's counsel claimed that this action by defendants against Sanford, and the judgment entered and enforced against Sanford's individual property, constituted an election by defendants to consider Sanford as their customer in these transactions, and precludes the defendants from insisting that the plaintiff and not Sanford was their customer in these transactions in question, and that such act precludes them from contesting that question in this action. *Held*, that this legal proposition of the plaintiff's counsel cannot be sustained either by principle or by authority. The doctrine invoked is "the election

of remedies." This doctrine cannot be invoked and made available beyond the point of precluding the defendants, after suing Sanford on the account, from proceeding against the plaintiff to recover any balance not realized in judgment against Sanford. Such action on the part of the defendants cannot create a remedy in favor of the plaintiff that did not exist before the action. The relations between the bank and defendants existed and were fixed before Sanford absconded, and if the dealings before that time were with the bank, nothing that plaintiff's president said to defendants, and no action taken by the defendants in consequence thereof, could change the previous existing relations. The cases cited by counsel do not sustain the proposition he seeks to establish in this case. They do not go further than to hold that where the plaintiff has two inconsistent remedies and adopts one of them he cannot afterwards resort to the other. The referee's conclusion upon the whole case, and the judgment entered in pursuance thereof, are correct. *Central Nat. Bk. v. White*, 257.

4. Upon a former trial of this action the court held, that two papers introduced in evidence, one a receipt and the other a deposit in escrow, established a contract for the sale of the Kentucky lands from defendant to Wolfe and Millikin, and that all prior negotiations merged in these two papers, and directed a judgment in favor of plaintiff, awarding him his commissions. The defendant insisted, upon that trial, "that there was an unexpressed condition upon which the writings were delivered," and asked to prove that condition, and so established what defendant claimed was the whole and complete contract between the parties. This parol evidence offered was rejected by the court on the

ground that the writings named were conclusive. When the case reached the Court of Appeals, that court held that this ruling rejecting the parol evidence was erroneous, and for the error reversed the judgment. The Court of Appeals also held that there arose a question of fact for the jury which should have been submitted under proper instructions. Upon the new trial the evidence that had been rejected upon the former trial was admitted, and upon the question of fact that it raised, the jury found adversely to defendant upon sufficient evidence. *Held*, that whether the transaction was or was not a sale, was upon all the evidence a question for the jury, as was also the question of plaintiff's instrumentality in bringing it about, and the jury having found these facts in favor of the plaintiff, he became, in law entitled to his commissions. *Condict v. Cowdrey*, 315.

*Agency*—When party lending money may be the disbursing agent of the debtor—Plaintiff at defendant's request advanced certain moneys to aid in the prosecution of a certain enterprise in which defendant was interested. Some of the money was paid by check to plaintiff's husband who was defendant's agent in charge of the work. The remainder was paid directly at the oral request of the agent in charge to discharge obligations incurred in the prosecution of the work. *Held*, that the only question was as to advances not made by check drawn to the order of the agent in charge, but made to others at his request. As to such payments, plaintiff may be regarded as the disbursing agent of defendant. To have first put the money in the hands of the agent in charge would have been a mere ceremony. See *Seybold v. Bostelmann*, 454.

*Broker's commission*—Where sever-

al brokers are endeavoring to sell the same property, the one affecting the sale only is entitled to the commission. The mere fact that one of the unsuccessful brokers first introduced the principals does not establish his right to recover. *Alden v. Earle*, 56 Super. Ct. Rep., 366; 121 N. Y. 688, followed. See *Clarkson v. Howland*, 456.

### APPEAL.

1. Where a court has on a former appeal in the same case examined and decided questions in a case, it will not on a second appeal re-examine the questions or change or modify its former decision upon the same state of facts. *Griggs v. Day*, 124.
2. In this case, at the last trial, the parties stipulated that the evidence introduced upon the former trial, as printed in the case upon the former appeal, should be the evidence of the parties on the second and new trial. *Held*, that all objections and exceptions to the admission or exclusion of evidence, as the same appeared in said case, were waived, and, therefore, no exceptions to the admission or exclusion of evidence were taken by either party on the new trial. *Ib.*
3. *Held also*, that the evidence as thus submitted supports the findings of fact made by the referee, and the findings of fact fully sustain the conclusions of law made thereon. The referee has given proper effect to the rulings made on the former appeal so far as they are applicable, and no exception appears on either side that calls for a reversal or modification of the judgment, and these appeals should be affirmed on the opinion and supplemental opinion made and filed by the referee. *Ib.*
4. On the 30th day of April, 1892, an order was duly entered in this action (*ex parte*) declaring the

plaintiff's "case on appeal" abandoned. The plaintiff obtained an order to show cause why the order of 30th of April declaring "the appeal" abandoned should not be vacated. This motion was heard by Judge McADAM, and on the 23d day of May, 1892, an order was entered denying the motion to vacate the order of April 30th. The plaintiff served a notice of appeal from an order denying a motion to vacate an order declaring the "appeal herein" abandoned, and this is the appeal before the court. *Held*, there was no such order granted as the notice of appeal described (declaring the appeal abandoned.) The original order of April 30, 1892, declared the case on appeal abandoned, which left the plaintiff free to prosecute the appeal on the judgment-roll. This order was duly made and entered, and has not been appealed from. There was no order made in this action declaring the appeal abandoned, and no order entered denying a motion to vacate such an order. *Rannow v. Hazard*, 217.

5. *Held also, on the merits*, that the plaintiff had not sufficiently excused his default. *Ib.*
6. In this case the conflict between the witnesses of the respective parties was quite marked, and the result depended upon the credibility of the witnesses in the judgment of the referee. Upon the case as presented on this appeal the court would not be justified in interfering with the decision of the referee on the ground that his findings were against the weight of evidence. Nor is there any merit in the claim that some of the facts found by the referee are not supported by the evidence. The facts being so found from the evidence, they support the conclusion of law based thereon, in conformity with which the

judgment was entered. *Seggermann v. Hillis Plantation Coffee Co.*, 283.

7. Relator was a member of the fire department of the city of New York. On charges preferred against him for assault on a superior officer, he was tried before the board of fire commissioners, found guilty and dismissed from the force. On the review on appeal, *Held*, that the respondents had jurisdiction to make the order. They complied with all the formalities required by the statute. The preponderance of evidence indicates that the relator was guilty of an act of insubordination and breach of discipline and "*conduct injurious to the public peace and welfare*," that sustains the conclusions of the commissioners as to his guilt, and for which, under section 440 of the Consolidation Act he could be dismissed from the force. Section 2141, of the Code of Civil Procedure, authorizing the court, upon a hearing on return to a writ of certiorari, "*to make a final order annulling or confirming wholly or partly, or modifying the determination reviewed*" do not authorize the review or modification of the determination of inferior jurisdiction, in matters within their jurisdiction, *which are confided to their discretion*. *People ex rel. Burns v. Purroy*, 284.
8. This is an appeal from an order made at special term by Judge GILDERSLEEVE granting a motion made by defendant to vacate an order heretofore made in the action setting off costs, and amending the judgment so as to make it include the costs to which defendant was originally entitled, but which were extinguished by the set-off. The complaint stated two causes of action. Upon the trial defendant prevailed upon the first cause of action, and plaintiff upon the second. Each

party thus became entitled to costs as against the other. Defendant moved for an order directing that the costs of each party when taxed by the clerk to set off one against the other, and the balance only included in the judgment. This motion was granted by Judge FREEDMAN, and an order entered February 15, 1887, and it is this order which the order now appealed from has set aside. The costs of each party were taxed in pursuance of Judge FREEDMAN's order, those of plaintiff at \$618.67, and those of defendant at \$570.44, and judgment entered in favor of plaintiff for the balance of costs in her favor, \$48.23. Both parties appealed from the judgment to the general term, which affirmed it, and both parties then appealed to the Court of Appeals, which Court affirmed so much of the judgment as was appealed from by plaintiff and reversed those parts appealed from by defendant, and dismissed the entire complaint with costs. The remittitur was filed, And the judgment of the Court of Appeals made the judgment of this court February 15, 1892. Defendant presented a bill of costs to the clerk for taxation, including in it the amount of the costs of the trial as originally taxed in February, 1887, and the entire costs of the action, which were allowed by the clerk. Plaintiff appealed against such taxation and Judge MCADAM reversed it, holding that the costs awarded by the Court of Appeals were the costs in that court only, in the following opinion: "MCADAM, J.—The complaint states two causes of action. One at law to recover \$150,000 damages for breach of contract, the other in equity for an injunction and incidental damages. The referee dismissed the first cause of action, but awarded plaintiff judgment on the second. The plaintiff

iff thereupon taxed her costs at \$618.67, and the defendant its costs at \$570.44. Set-off was allowed and the plaintiff in consequence entered judgment in her favor for the equitable relief, with \$48.23, costs (the difference), and the defendant for the dismissal of the first count, without costs (the set-off having absorbed them). Both sides appealed; the judgment on the first count was affirmed by the general term, and the second count (modified in form) was also affirmed thereat 'without costs to either party.' Both sides again appealed, this time to the Court of Appeals, which court expressed its judgment in these words: 'That said judgment so far as appealed from by the plaintiff be affirmed, and that said judgment, so far as appealed from by the defendant be reversed, and the complaint dismissed with costs.' The clerk on application of the defendant taxed defendant's costs in all the courts. This was error. He should have taxed the costs to the Court of Appeals only. *In re Water Commissioners*, 104 N. Y., 677; *Franey v. Smith*, 126 *Ib.*, 658. The taxation must therefore be reversed, but with liberty to the defendant to move by way of restitution to vacate the order for set-off and for leave to amend the original judgment roll *nunc pro tunc* by inserting therein in suitable language the costs originally taxed on the dismissal of the first cause of action, to the end that the defendant may not be deprived of them. These belong to the defendant as of right, not by the courtesy of the court but by force of the statute. The judgment made by the Court of Appeals eliminated not only the plaintiff's recovery but the costs allowed to her which were made the subject of set-off. The new condition, final in its character, seems to war-

rant restitution to the defendant in furtherance of justice and to prevent abuse. The control which every court has over its own judgments would seem to sustain the power." The order now appealed from was moved for in accordance with the suggestions contained in the above opinion, and, on granting the motion, Judge GILDERSLEEVE filed this memorandum: "The question presented on this motion has been passed upon by my learned associate, Judge MCADAM; motion granted without costs; order to be settled in accordance with Judge MCADAM's opinion." *Held*, That the court at special term had power to order restitution, and the order should be affirmed. *Genet v. Del. & H. Canal Co.*, 332.

#### APPEARANCE.

*Vacation of judgment upon the ground that no process had ever been served upon the defendant Smith, and that he never authorized any one to appear for him, etc. See Mayor v. Smith*, 374.

#### ARREST.

Order of arrest, exception to the sufficiency of bail and proceedings thereon. *Held*, that this order cannot be sustained. The plaintiff had not waived his right to the examination of the sureties, but had proceeded regularly to enforce it. *Hetsch v. Bishop*, 441.

#### ATTACHMENT.

In this case the attachment was vacated on the ground that the pleadings and affidavits did not show an injury to personal property within the meaning of section 635, of the Code of Civil

Procedure, and from that order of vacation plaintiffs appeal. *Held*, that the order is affirmed on the opinion of the court below. *Roome v. Jennings*, 361.

#### ATTORNEY AND CLIENT.

*Contract for attorney's services—Compensation based upon results of litigation—Measure of damages where retainer of attorney is revoked by client before services are completed—Plaintiff was retained by defendant in certain street opening proceedings affecting defendant's premises, to diminish the assessment and increase the award, plaintiff to receive one-fourth of the amount saved, as contingent compensation. After plaintiff had taken certain steps, but before the hearing by the commissioners, defendant revoked plaintiff's authority and employed another attorney. Held, that plaintiff was entitled to recover one-fourth of the amount saved to defendant by the proceedings, being the agreed compensation, less the fair value of the services, and disbursements necessary to complete the plaintiff's undertaking, after his authority was revoked. See Bassford v. White, 457.*

#### BILLS, NOTES, AND CHECKS.

1. Promissory note, defence thereto; that it was made and endorsed without consideration for the accommodation of one Simmons, and diverted by him from the purpose for which it was entrusted to him, and the evidence fully supported that position and required the plaintiff to show that it paid value for the paper, and the single and main point in the case was whether, upon the evidence, the plaintiff was entitled to go to the jury upon the question as to whether it parted

with value upon the faith of the note. *Held*, that the evidence established that the plaintiff neither paid nor surrendered anything of value on the faith of the note in suit, and there was nothing to go to the jury on any of the questions involved in the action, and the verdict for the defendants was properly directed. *Sixth. Nat. Bk. v. Lorillard Brick Works Co.*, 29.

2. Three actions, to recover on three promissory notes, the facts in each of which are similar, so that all the questions involved in the three cases are considered and disposed of by a decision in one. *Held*, that the issues in these actions were simple, and all the complications arose from the efforts of the defendant to present facts and questions in defence of the action that are not raised by the pleadings nor germane to the controversy before the court, yet requiring the court to state all the issues raised and the points claimed by the defence, that the propositions involved may be intelligently considered and understood. After such statement, and a full review of the facts and points, the court held, that the plea of payment and satisfaction set up in the answer was not proved, and apart from the complications of fact and law, thrown into the case by the defendant, there does not seem to have been a shadow of a defence established. *Coffin v. Grand Rapids Hydraulic Co.*, 51.

3. The objection that the plaintiff could not maintain the action is untenable. If the defendant intended to raise the objection that the plaintiffs were not the real parties in interest, it should have been pleaded in defence. There was no real substantial or meritorious defence to the action, and the verdict directed by the court in each case merely gives effect to the legal rights and obligations of the parties. *Ib.*

4. The defendant Whitney made the \$4,000 note in suit, May 1, 1889, payable to his own order, thirteen months from its date, and indorsed the note, first by his individual name and next by that of Fitch & Whitney, a firm of which he was a member, and delivered the same to one Hills in consideration of moneys loaned by Hills to Whitney long before the firm of Fitch & Whitney was formed. The plaintiff received the note from Hills before maturity and gave him (Hills) credit for the amount of the same on an account due to plaintiff from Hills. *Held*, that the plaintiff having parted with nothing on the faith of the paper, he did not become a *bona fide* holder thereof for value under the rules established in this state. The plaintiff simply succeeded to the rights of Hills, subject to all the equities existing between him and the defendants. Hills could not have maintained an action on this note against Fitch, because he knew the note and its endorsement had no connection nor business relation whatever with the firm of Fitch & Whitney, or its firm business. It was exclusively and absolutely the private transaction and personal contract of Whitney, and the plaintiff stands in no better position than Hills stood. Each partner is the agent of the partnership in, and as to all matters within the scope of the partnership business, and can bind the firm by making, endorsing and accepting bills and notes in relation to such business; but a partner has no more authority than a mere stranger to execute such paper in his individual business or for the accommodation of others; but as every partner has *prima facie* equal power to execute paper, a note signed by the firm name, although made by a single partner, is presumably a firm note; but when it appears, as in this case, that the note was

not indorsed in the course of partnership business, but for the benefit of Whitney, and this fact was known to Hills, then it was incumbent on Hills' transferee to show that Fitch as well as Whitney assented to the endorsement, that Fitch was a party to the contract. His assent must be proved and will not be implied or presumed. The exception to this rule exists only in favor of a *bona fide* holder for value without notice, for the giving of a note in partnership name by a partner, is a virtual representation that it is given in the partnership business and, if negotiable, this representation is deemed in law to have been made to every *bona fide* holder of the note, and the firm is estopped from denying the authority of the partner to execute and issue the instrument. The admissions made by one of a number of persons sought to be charged as partners, cannot be used against the others. Nothing short of the separate admissions of each is competent to establish a partnership between them. *Lyon v. Fitch*, 74.

*Liability of defendants to repay the bank, plaintiff, moneys received by them from one Sanford, a former cashier of the bank, in the shape of cashier's checks, on account of Sanford's personal stock speculations. See Central Nat. Bk. v. White*, 257.

#### BROKER.

See AGENCY.

#### CERTIORARI.

Relator was a member of the fire department of the city of New York. On charges preferred against him for assault on a superior officer, he was tried before the board of fire commissioners, found guilty and dismissed from

the force. On the review on appeal, *Held*, that the respondents had jurisdiction to make the order. They complied with all the formalities required by the statute. The preponderance of evidence indicates that the relator was guilty of an act of insubordination and breach of discipline and "*conduct injurious to the public peace and welfare*," that sustains the conclusions of the commissioners as to his guilt, and for which, under section 440 of the Consolidation Act he could be dismissed from the force. Section 2141, of the Code of Civil Procedure, authorizing the court, upon a hearing on return to a writ of certiorari, "*to make a final order annulling or confirming wholly or partly, or modifying the determination reviewed*" do not authorize the review or modification of the determination of inferior jurisdiction, in matters within their jurisdiction, *which are confided to their discretion.* *People ex rel. Burns v. Purroy*, 284.

*Certiorari to review proceedings of police commissioners. Where the writ directs the commission to certify all the acts and proceedings sought to be reviewed, it will be presumed from the absence of the statement in the return that it contains all of such acts and proceedings, and from the fact that the judgment of the commissioners in the case is not referred to in the return, that all the acts of the Board have not been returned and a further return containing such statement with other proper matter should be directed.* See *People ex rel. Minchen v. MacLean*, 458.

#### CHATTEL MORTGAGE.

1. There were no material misrepresentations made by defendants to induce the plaintiff to execute the bill of sale in this case.

Plaintiff intended to give defendants security for their demands against him, and it was executed in the form of a bill of sale, when a chattel mortgage might have been more appropriate for the purpose intended. After the defendants received the bill of sale, they asserted their rights under it, sooner than the plaintiff expected, and plaintiff's store and stock in trade, etc., were sold to satisfy defendants' claims. This action was to set aside the bill of sale on the ground of fraud. *Held*, that the bill of sale was not procured by fraudulent representations as to material facts, and should not be set aside, and, therefore, the complaint was properly dismissed. Although the bill of sale was absolute on its face, it was clearly intended as security for the debt by way of mortgage and not as a satisfaction thereof, and if this action had been to declare it as a mere security for the sum due and for an accounting of the proceeds of sale, it would have been maintained; but this action is founded on fraud to avoid the instrument altogether and for damages, as if no writing whatever had been executed or intended to be executed. The plaintiff is not entitled on the evidence in the case to the broad relief claimed. *Schelling v. Bischoff*, 68.

2. The property in question, consisting of gas fixtures, were leased by plaintiff to one Woolf on the conditional sale and installment plan, the title to remain in plaintiff until the fixtures were paid for. While the property was in possession of Woolf he mortgaged the same to the defendant, who subsequently foreclosed the mortgage and disposed of the fixtures. The plaintiff brings suit to recover their value as for conversion. The defence is that defendant had no knowledge of the transaction between plaintiff and Woolf, and

plaintiff having neglected to file the agreement providing that the title to the fixtures should remain in him until paid for, it became inoperative and void under Chapter 315, Laws of 1884. The Act cited, as amended in 1886, does not apply to "household goods." *Held*, that gas fixtures are "household goods" within the proper meaning of that term, which has been defined as more comprehensive than "furniture," and includes every article of personal property in the house or on the premises intended for ornament, use or consumption. *Iden v. Sommers*, 177.

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See JOCKEY CLUBS.

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#### CONTRACTS.

1. *Held*, that the transaction between the plaintiff and defendant was practically a sale of goods by the former to the latter on its credit at twenty per cent. less than trade prices, deliverable in such manner as defendant directed. The defendant insists that, under the circumstances, the plaintiff should have declared on this special agreement and cannot recover on a general count for goods sold and delivered. The Code has not changed the former rule of pleading, that a party, who has fully performed a special contract may rely upon the implied assumpsit of the other party to pay him the stipulated price, and he is not bound to declare specially upon the special agreement. Under this rule the complaint was sufficient. *Swan Lamp Mfg. Co. v. Brush-Swan Electric Light Co.*, 11.
2. The only question in dispute between the parties arises from a construction of the written contract, and a supplement thereto written at its foot, wherein defendant promised to pay extra for all stone work "that may not be called for in plans and specifications left at plaintiff's February 15, 1889." The court held that the plaintiff fulfilled the contract according to specifications, etc., and also furnished other granite work at request of defendant, for which he was entitled to payment under the supplemental agreement. The facts and points in the case appear fully in the opinion of the court. *Millstone Granite Co. v. Dolan*, 106.
3. The agreement provided for the payment of one hundred and fifty shares of capital stock of the Staten Island Water Supply

- Company, when the water works that the defendants' testator were building under contract were turned over and accepted by said company. Before the water works had been accepted, and before the completion of the contract in regard to them, defendants' testator assigned his contract to another party and procured a release from the company. *Held*, that on the face of the contract, and from extrinsic circumstances, it appears that the acceptance was referred to only as a date or time of payment of the capital stock. It also appears that the testator was solely responsible for the acceptance never taking place. He could not by his own act dissolve the obligation of the contract, and his executors are liable upon it. *Smith v. Lockwood*, 114.
4. This action was to recover the salary of James R. Wardlaw, as assistant engineer, during the interim between the time of his suspension and his final discharge. The defence was that Wardlaw was appointed city surveyor, and his attempt to hold the position of assistant engineer was holding two offices which, under section 55 of the Consolidation Act, prevents a recovery. *Held*, that defendant might have discharged decedent and relieved itself from all liability, but it could not suspend him without pay. The appointment of city surveyor is not an office within the meaning of section 55 of the Consolidation Act. Office, in the sense there employed, embraces the idea of public station, tenure, emolument and duties, involving the right and duty to execute some public trust. The position of city surveyor has no tenure or salary; does not exist independently of the incumbent, and does not become vacant by his death, removal or resignation. *Wardlaw v. The Mayor*, 174.
5. The property in question, consisting of gas fixtures, were leased by plaintiff to one Woolf on the conditional sale and installment plan, the title to remain in plaintiff until the fixtures were paid for. While the property was in possession of Woolf he mortgaged the same to the defendant, who subsequently foreclosed the mortgage and disposed of the fixtures. The plaintiff brings suit to recover their value as for conversion. The defence is that defendant had no knowledge of the transaction between plaintiff and Woolf, and plaintiff having neglected to file the agreement providing that the title to the fixtures should remain in him until paid for, it became inoperative and void under Chapter 315, Laws of 1884. The Act cited, as amended in 1886, does not apply to "household goods." *Held*, that gas fixtures are "household goods" within the proper meaning of that term, which has been defined as more comprehensive than "furniture," and includes every article of personal property in the house or on the premises intended for ornament, use or consumption. *Iden v. Sommers*, 177.
6. In an action upon a contract for purchase of property by plaintiffs and sale to defendants at a price named, together with freight charges, actual expenses advanced and one per cent. additional—subsequent to the delivery of the goods, it appeared that they had been undervalued at the Custom House, in the original entry, and plaintiffs were compelled to pay \$474.38 additional duties, which they sought to recover from defendants as *actual expenses incurred, etc.* Defendants claimed that said \$474.38 was paid as a fine or penalty for an under-valuation of the property for which defendants should not be held liable, etc. *Held*, it matters not whether the pay-

ment be considered as for a fine for under-valuation or for an additional duty; if it was for an expense advanced, within the meaning of the term "expenses" as used in the contract, the defendants must pay it. A fair interpretation of the word leads to the conclusion that it included the duties or fines. The parties so interpreted the contract in the payment of the first duties imposed, and as the fine does not appear to have been imposed through any fault of plaintiffs, the exceptions should be overruled. *Seggermann v. Valentine*, 248.

7. In an action to recover commissions claimed to be earned by plaintiff as a canvasser of the defendants' publications, the principal contention was the construction to be placed upon the words of the contract, which was oral. The plaintiff testified to the effect that in a conversation with the head of defendants' serial department it was agreed that he was to receive \$4 "an order for each order that he took" for the publications other than the cyclopedia, and \$15 "an order" for the cyclopedia. Blank subscription papers were supplied by the defendants to the plaintiff, who procured the signatures to the papers of a number of persons in Texas and Louisiana and forwarded the same by mail to the defendants. The plaintiff produced evidence tending to show that the subscription papers so signed were "orders" within the meaning of the contract, upon acceptance of which he was entitled to the agreed commissions. The defendants contended that the expression "four dollars an order" had a well-settled meaning in the business and was so understood by the parties to the contract, viz.: that the commission was to be regarded as earned only after the subscriber had taken and

paid for two parts or numbers of the work subscribed for. The referee refused to find this effect but did find that upon acceptance by the defendants of the orders, the commissions became due, and that defendants did so accept the orders. *Held*, that no error was committed by the referee in so ruling. If the referee erred in finding that the agreement in question was that the plaintiff should be paid when his orders were delivered to defendants and accepted by them, he only erred in finding that an acceptance by defendants was a part of the agreement, and such an error could not prejudice defendants. There was evidence that an order became a good order upon acceptance by defendants, and such acceptance was shown, as in the present case, by the reception of the orders and entry thereof in the firm books. *Newhall v. Appleton*, 251.

8. *Held*, that defendant could not have the benefits of a valid contract without bearing its burdens. She could not be permitted to affirm in part, and rescind in part. The trial judge properly compelled the defendant to elect either to stand on her alleged counter-claim and affirm the contract, or to abandon the counter-claim and stand upon the alleged facts as a defence. The offered evidence of preparations made by defendant was properly excluded. The only theory on which such evidence might be admissible is that it would show defendant's belief in the representations made. But no representation is available for that purpose unless it is a representation as to an existing material fact, and the representations relied upon for rendering the excluded evidence admissible related to mere expectations and not to existing material facts. If defendant wished to rely upon the representations of

- expectations which she claimed the plaintiff's committee made to her, she should have exacted a guaranty of the number to be present or a guaranty of profits. *Societa Italiana, etc., v. Sulzer*, 325.
9. In an action upon a contract of guaranty to recover dividends, at the rate of 7% per annum, on \$150,000 of the capital stock of the Philadelphia and New York Steam Navigation Company, defendants claimed that the dissolution of the corporation, by proceedings set forth in their answer, released them from the performance of the contract of guaranty, and the effect of those proceedings upon the contract, and how far they furnish a legal excuse for non-performance, is the main question for decision. *Held*, that the contract was not affected by said proceedings, and they constituted no defence to the action. *Lorillard v. Clyde*, 428.
- Marine insurance**—Cancellation of policy by agreement of parties does not affect a loss of a ship prior to the cancellation that was unknown to both parties. See *Duncan v. N. Y. Mut. Ins Co.*, 13.
- Injunction**—Lease, and agreement to lease, partly in writing and partly by parol—Parol testimony in regard to written documents and in explanation thereof. See *Lynch v. Hunneke*, 235.
- Option for the purchase of mining property** claimed by defendant as owner and sold. Plaintiff's claim a joint interest with defendant in said option and the proceeds of sale thereof, and demand an accounting, etc. See *Michel v. Colegrove*, 275.
- Life insurance, policy of**—Application for insurance and statements therein and the by-laws referred to in the policy and made a part thereof, must be considered as one instrument with the policy. See *Studwell v. Mut. Benefit Life Ass'n*, 287.
- Real estate broker, commissions of, when earned.** See *Condict v. Cowdrey*, 315.
- Mandatory injunction**—Sale of a race-horse with all his racing engagements, and sale of same on a statement that he was "eligible" for certain races considered. See *Corrigan v. Coney Island Jockey Club*, 393.
- Agency**—When party lending money may be the disbursing agent of the debtor—Plaintiff at defendant's request advanced certain moneys to aid in the prosecution of a certain enterprise in which defendant was interested. Some of the money was paid by check to plaintiff's husband who was defendant's agent in charge of the work. The remainder was paid directly at the oral request of the agent in charge to discharge obligations incurred in the prosecution of the work. *Held*, that the only question was as to advances not made by check drawn to the order of the agent in charge, but made to others at his request. As to such payments, plaintiff may be regarded as the disbursing agent of defendant. To have first put the money in the hands of the agent in charge would have been a mere ceremony. See *Seybold v. Bostelmann*, 454.
- Contract for attorney's services**—Compensation based upon results of litigation—Measure of damages where retainer of attorney is revoked by client before services are completed. Plaintiff was retained by defendant in certain street opening proceedings affecting defendant's premises, to diminish the assessment and increase the award, plaintiff to receive one-fourth of the amount saved, as contingent compensation. After plaintiff had taken certain steps, but before the hearing by the commissioners, defendant revoked plaintiff's authority and employed another attorney. *Held*, that plaintiff was entitled

to recover one-fourth of the amount saved to defendant by the proceedings, being the agreed compensation, less the fair value of the services and disbursements necessary to complete the plaintiff's undertaking, after his authority was revoked. See *Bassford v. White*, 457.

### CONVERSION.

1. The property in question, consisting of gas fixtures, was leased by plaintiff to one Woolf on the conditional sale and installment plan, the title to remain in plaintiff until the fixtures were paid for. While the property was in possession of Woolf he mortgaged the same to the defendant, who subsequently foreclosed the mortgage and disposed of the fixtures. The plaintiff brings suit to recover their value as for conversion. The defence is that defendant had no knowledge of the transaction between plaintiff and Woolf, and plaintiff having neglected to file the agreement providing that the title to the fixtures should remain in him until paid for, it became inoperative and void under Chapter 315, Laws of 1884. The Act cited, as amended in 1886, does not apply to "household goods." *Held*, that gas fixtures are "household goods" within the proper meaning of that term, which has been defined as more comprehensive than "furniture," and includes every article of personal property in the house or on the premises intended for ornament, use or consumption. *Iden v. Sommers*, 177.
2. In an action for the conversion of lithographic stones *Held*, that the complaint was properly dismissed, because of the failure of the plaintiff to establish a title to the lithographic stones. The action being for conversion, the plaintiff was bound to establish

title. The stones must be regarded as the principal, and the impressions thereon as a mere incident, and the plaintiff could not maintain conversion based upon the refusal of the defendant to deliver up the impressions and an offer to pay the value of the stones. A delivery of the impressions cannot be made without giving up the stones also, nor is a mere refusal to permit a transfer to be made of the impressions sufficient to sustain the action. Conversion would only lie upon proof of the destruction of the plaintiff's interest in the impressions. Short of that, and under the special circumstances of this case, the plaintiff's remedy against the defendant is in equity. *Knight v. Sackett & Wilhelms L. Co.*, 219.

### CORPORATIONS.

In an action upon a contract of guaranty to recover dividends, at the rate of 7% per annum, on \$150,000 of the capital stock of the Philadelphia and New York Steam Navigation Company, defendants claimed that the dissolution of the corporation, by proceedings set forth in their answer, released them from the performance of the contract of guaranty, and the effect of those proceedings upon the contract, and how far they furnish a legal excuse for non-performance, is the main question for decision. *Held*, that the contract was not affected by said proceedings and they constituted no defence to the action. *Lorillard v. Clyde*, 428.

### COSTS. .

1. The stipulation of the parties in writing provided "That the referee shall not be limited to the statutory fee of six dollars per

day for his services in this case, but may charge such fees therefor as he deems proper." The referee's charges in the case were objected to on taxation, on the ground that the stipulation failed to specify any *specific* rate of compensation, and, therefore, was not "*a different rate of compensation fixed by consent of the parties*," as provided by the Code. The clerk, as taxing officer, sustained the objection, and the special term judge, on appeal, sustained the clerk's ruling. *Held*, that this decision must be affirmed, under the construction of the Court of Appeals in *First National Bank v. Tamajo*, 77 N. Y., 476, and *Mark v. City of Buffalo*, 87 N. Y., 184, although the court in its opinion in this case considers the decision and construction of the Supreme Court in *Burt v. Oneida Community*, 59 Hun, 234, to be preferable for reasons cited in the opinion of the court, which fully sets forth the facts and points in this case. *Griggs v. Day*, 25.

2. This is an appeal from an order made at special term by Judge GILDERSLEEVE granting a motion made by defendant to vacate an order heretofore made in the action setting off costs, and amending the judgment so as to make it include the costs to which defendant was originally entitled, but which were extinguished by the set-off. The complaint stated two causes of action. Upon the trial defendant prevailed upon the first cause of action, and plaintiff upon the second. Each party thus became entitled to costs as against the other. Defendant moved for an order directing that the costs of each party when taxed by the clerk to set off one against the other, and the balance only included in the judgment. This motion was granted by Judge FREEDMAN, and an order entered February 15,

1887, and it is this order which the order now appealed from has set aside. The costs of each party were taxed in pursuance of Judge FREEDMAN's order, those of plaintiff at \$618.67, and those of defendant at \$570.44, and judgment entered in favor of plaintiff for the balance of costs in her favor, \$4.823. Both parties appealed from the judgment to the general term, which affirmed it, and both parties then appealed to the Court of Appeals, which court affirmed so much of the judgment as was appealed from by plaintiff and reversed those parts appealed from by defendant, and dismissed the entire complaint with costs. The remittitur was filed, and the judgment of the Court of Appeals made the judgment of this court February 15, 1892. Defendant presented a bill of costs to the clerk for taxation, including in it the amount of the costs of the trial as originally taxed in February, 1887, and the entire costs of the action, which were allowed by the clerk. Plaintiff appealed against such taxation and Judge MCADAM reversed it, holding that the costs awarded by the Court of Appeals were the costs in that court only, in the following opinion: "MCADAM, J.—The complaint states two causes of action. One at law to recover \$150,000 damages for breach of contract, the other in equity for an injunction and incidental damages. The referee dismissed the first cause of action, but awarded plaintiff judgment on the second. The plaintiff thereupon taxed her costs at \$618.67, and the defendant its costs at \$570.44. Set-off was allowed, and the plaintiff in consequence entered judgment in her favor for the equitable relief, with \$48.23 costs (the difference), and the defendant for the dismissal of the first count, without costs (the set-off having

absorbed them). Both sides appealed; the judgment on the first count was affirmed by the general term, and the second count (modified in form) was also affirmed thereat 'without costs to either party.' Both sides again appealed, this time to the Court of Appeals, which court expressed its judgment in these words: 'That said judgment so far as appealed from by the plaintiff be affirmed, and that said judgment, so far as appealed from by the defendant be reversed, and the complaint dismissed with costs.' The clerk on application of the defendant taxed defendant's costs in all the courts. This was error. He should have taxed the costs to the Court of Appeals only. *In re Water Commissioners*, 104 N. Y., 677; *Franey v. Smith*, 126 *Ib.*, 658. The taxation must therefore be reversed, but with liberty to the defendant to move by way of restitution to vacate the order for set-off and for leave to amend the original judgment roll *nunc pro tunc* by inserting therein in suitable language the costs originally taxed on the dismissal of the first cause of action, to the end that the defendant may not be deprived of them. These belong to the defendant as of right, not by the courtesy of the court but by force of the statute. The judgment made by the Court of Appeals eliminated not only the plaintiff's recovery but the costs allowed to her which were made the subject of set-off. The new condition, final in its character, seems to warrant restitution to the defendant in furtherance of justice and to prevent abuse. The control which every court has over its own judgments would seem to sustain the power." The order now appealed from was moved for in accordance with the suggestions contained in the above opinion, and, on grant-

ing the motion, Judge GILDER-SLEEVE filed this memorandum: "The question presented on this motion has been passed upon by my learned associate, Judge MCADAM; motion granted without costs; order to be settled in accordance with Judge MCADAM's opinion." *Held*, That the court at special term had power to order restitution, and the order should be affirmed. *Genet v. Del. & H. Canal Co.*, 332.

*Easements taken by elevated railroad—Valuation thereof by trial court will be reviewed by general term and if not sustained by the evidence, the injunction may be modified by suspending its operation for a reasonable time to enable the defendants to take condemnation proceedings. Blumenthal v. N. Y. Elevated R. R. Co.*, 42 N. Y. State Rep., 683, followed. Judgment also modified by deducting from the money part thereof so much of the extra allowance as was based on the sum fixed as the valuation of the easements. See *Bolger v. Met. El. Ry. Co.*, 459.

#### COVENANT.

The Taylor company, under a lease from the appellant Miller, uses the premises on the southeast corner of Madison avenue and Forty-third street, adjoining the residence of respondent, for the sale of caskets and goods for funerals; also for embalming bodies, for autopsies and post-mortem examinations, and for the reception of human remains awaiting funeral rites and burial. The question is whether the business described is injurious or offensive within the meaning of the covenant. *Held*, that anything that is hurtful or noxious, that disturbs happiness, impairs rights, or prevents the enjoyment of them, is injurious; and if it causes displeasure,

gives pain or unpleasant sensations, is offensive. The disturbing cause must be real not fanciful, must be more than mere delicacy or fastidiousness, but it need not necessarily be apparent to the sense of sight, smell or hearing, for it may be injurious without offending either. The plaintiff is not required to prove that defendant is maintaining a nuisance. She is seeking to enforce a covenant restricting the use of the adjoining property, and all she is required to prove is, that the use complained of is repugnant to the letter and spirit of the covenant. The mere fact that in this case there has been a breach of the covenant, by which each party is bound, is sufficient for the interference of the court by an order of injunction. The uses of such an establishment as the defendant, no matter how well conducted, is a source of injury to adjoining property, and is, to the fullest extent, "injurious" as well as "*offensive to neighboring inhabitants*" within the meaning of that term as used in the covenant sought to be enforced. The judgment of the special term sustained. *Rowland v. Miller*, 163.

*Landlord and tenant—Lease, breach of covenant thereof—Damages.* See *U. S. Trust Co. v. O'Brien*.

#### DAMAGES.

This action was brought to recover damages for an alleged breach of the usual clause or covenant in a lease which required the defendant (the lessee) to permit the notice "To Let" to be placed upon the building, and to allow the building to be inspected by persons desiring to rent the same from the plaintiff (the lessor). A sub-tenant of the defendant occupying the premises from

March 1 to May 1, 1889, the last portion of the term, refused to permit the plaintiff to exhibit the premises or to put up the bill of "To Let" thereon, as provided for in the covenant. There was no evidence that the plaintiff could have rented the premises, beyond that to be inferred from the fact that defendant's sub-tenant refused to show the premises to a person taken there to inspect them and to permit the bill "To Let" to remain on the premises. After the termination of the lease the premises remained vacant for about five months. They were worth about \$75 per month, and the jury awarded the plaintiff \$375 damages, being the rent for the time the premises were vacant. *Held*, that there was no reasonable certainty that the plaintiff would have let the house if the covenant claimed to have been violated had been literally and fully performed. There was no solid substantial basis on which the jury could find, as matter of fact, that the refusal to perform this covenant was the sole cause of keeping plaintiff's house idle for five months, and in consequence plaintiff lost so many months' rent. The result arrived at was necessarily speculative and conjectural. The jury were limited to an award for damages or compensation for the *actual*, not the *possible* loss, and from the evidence there is no way of determining that the sum awarded was necessary to compensate for the real injury done, or that the acts of the under-tenant were the proximate cause of so much damage. There was nothing in the proofs presented on the trial of this action to warrant the damages allowed to the plaintiff and awarded by the verdict of the jury. *U. S. Trust Co. v. O'Brien*.

*Contract for attorney's services—Compensation based upon re-*

*sults of litigation—Measure of damages where retainer of attorney is revoked by client before services are completed. Plaintiff was retained by defendant in certain street opening proceedings affecting defendant's premises, to diminish the assessment and increase the award, plaintiff to receive one-fourth of the amount saved, as contingent compensation. After plaintiff had taken certain steps, but before the hearing by the commissioners, defendant revoked plaintiff's authority and employed another attorney. Held, that plaintiff was entitled to recover one-fourth of the amount saved to defendant by the proceedings, being the agreed compensation, less the fair value of the services and disbursements necessary to complete the plaintiff's undertaking, after his authority was revoked. See Bassford v. White, 457.*

#### DEED.

The object of this action was to obtain a judgment of this court, to the effect, that certain pieces of real estate, the title to which, at the time of the death of Isaac L. Pinckney, stood in the name of his widow, Henrietta Pinckney, were equitably a part of the estate of Isaac L. Pinckney when he died. These pieces had been duly conveyed to Henrietta Pinckney at the request of her husband, who paid the consideration for the same. The plaintiffs claimed that the conveyances in question created a trust in said Henrietta Pinckney to consider and treat and dispose of the same as the property and estate of Isaac L. Pinckney, under his last will and testament, in which he appointed the said Henrietta as sole executrix. The plaintiffs also claimed that said Henrietta Pinckney had accepted such

grants on her promise that she should hold the said real estate in trust and not as her own absolute property. The court held that no promise had been proved, and that if it had been so proved it would have been void, as also would have been the so-called and claimed trust. That if such an oral promise or oral trust had been established, it would not have been fraud on the part of the grantee to have refused to recognize the validity of either. The inference from the whole testimony in the case is, that Isaac L. Pinckney did intentionally what he did do, or cause to be done, in regard to the conveyances, intending and meaning that his action in the premises should have its full legal effect. *Watson v. Pinckney, 188.*

#### DEPOSITION.

1. This motion to vacate a judgment and to suppress the deposition of a witness taken by commission made upon a case and exceptions and affidavits is based on the fact that defendants before the execution of the commission had sent the witness a copy of the interrogations with the answers desired. Upon the trial defendants prevailed. *Held*, that the action of defendant in regard to the execution of the commission, taking the testimony of one Battelson in the case, indicates a disregard of the proprieties that all honorable men observe in the conduct of any litigation, however bitter, and is a trespass upon the code of ethics, which should control under such circumstances, and calls for severe condemnation by this court. The conduct of the defendant in this respect is inexcusable. But from a careful examination of all the evidence it does not appear that such action was a wrong from which de-

fendant derived any benefit, and, therefore, his conduct does not afford sufficient ground or reason to entitle the motion to prevail. *Michel v. Colegrove*, 280.

2. *Held*, that the plaintiffs are estopped from the relief sought by reason of their *negligence and laches*. The testimony of the witness was not controlling, it was only cumulative, and there is enough in the case, without the testimony of this witness, to sustain the judgment. A new trial cannot be obtained either for the purpose of furnishing new and additional cumulative evidence, nor for the purpose of destroying the cumulative evidence of the successful party. This rule is well settled, that if a witness examined on commission is instructed by the party in interest how to testify, the commission will be suppressed at the instance of the adverse party, on the ground that such conduct is prejudicial to him, corrupting to the witness, an abuse of process and a fraud on the court, interfering with pure administration of justice. But suppressing a commission in advance of the trial and granting a new trial after judgment, are quite different things. A judgment is intended to terminate a litigation and to conclude the parties as to every question raised or which might have been raised before the final result was reached, and rights so lost may never be regained. *Ib.*

#### EASEMENT.

1. In an action to secure an injunction and incidental damages against an elevated railroad with respect to plaintiff's premises which abutted both on Park Row through which the railroad ran, and Duane street, *Held*, that the portion of the premises in suit, known as No. 20 Duane street, is

not so cut off from the advantage of light and air from Park Row by solid separating walls without openings as to deprive such portion of easements in Park Row, the first floor of No. 20 Duane street being the continuation of a floor in No. 1 Chambers street. Beyond this, No. 20 Duane street in its front had an easement which was not limited to Duane street, but extended easterly to Park Row. *Bischoff v. N. Y. Elevated R. R. Co.*, 211.

2. The lease in question was for six lofts above the first floor, "*together with the appurtenances.*" These words gave to the plaintiffs whatever was attached to or used with the premises as incident thereto, and convenient or essential to the beneficial use and enjoyment thereof, and the plaintiffs took thereby any easement or servitude used or enjoyed with the leased premises; and, as the appurtenances were not specified, parol evidence was admissible to show that the parties, preparatory to the execution of the lease, met and discussed their character and extent, and agreed that the appurtenances should include all that they appeared to include, and that the defendant would not make a change in such appearances in derogation of his grant; and that in strict reliance upon the promise of the defendant, not to change the appurtenances as they then existed and were understood, the plaintiffs executed the lease. *Lynch v. Hunneke*, 235.

See ELEVATED RAILROADS.

#### ELECTION.

1. Between June, 1866, and July, 1869, plaintiff made purchases and sales of stocks, securities and gold, through the defendants, as brokers, and these dealings were managed and directed by San-

ford, who gave all orders to defendants that were brought to their office by plaintiff's clerks or messengers, and defendants were constantly receiving cashier checks, drawn by W. H. Sanford, cashier, upon the plaintiff, which were paid by plaintiff in the usual course of business through the clearing house. The defendants received in such dealings upwards of one hundred such checks, aggregating half a million of dollars, and no question or objection to the payment of these checks was ever made until July 1, 1869, when Sanford absconded after appropriating to his own use stocks, securities and moneys, of plaintiff and its customers. This action seeks to recover from defendants the amount of fourteen of the checks, selected out of the one hundred checks by plaintiff's counsel, on the ground that the money represented by these checks, and so paid to defendants, were for use in Sanford's private stock speculations, and that defendants knew actually or constructively what Sanford was doing. After Sanford's defalcation the plaintiff called upon defendants and was permitted to see Sanford's accounts, as kept by defendants, and then informed the latter that Sanford had been speculating on his own account. After receiving this information, defendants discovering certain balances in favor of Sanford with other brokers, they brought an action against him and recovered about \$2,000, by default, upon the theory that the transactions in question were with Sanford individually, and that he was their customer and not the plaintiff. Plaintiff's counsel claimed that this action by defendants against Sanford, and the judgment entered and enforced against Sanford's individual property, constituted an election by defendants to consider Sanford as their customer

in these transactions, and precludes the defendants from insisting that the plaintiff and not Sanford was their customer in these transactions in question, and that such act precludes them from contesting that question in this action. *Held*, that this legal proposition of the plaintiff's counsel cannot be sustained either by principle or by authority. The doctrine invoked is "the election of remedies." This doctrine cannot be invoked and made available beyond the point of precluding the defendants, after suing Sanford on the account, from proceeding against the plaintiff to recover any balance not realized in judgment against Sanford. Such action on the part of the defendants cannot create a remedy in favor of the plaintiff that did not exist before the action. The relations between the bank and defendants existed and were fixed before Sanford absconded, and if the dealings before that time were with the bank, nothing that plaintiff's president said to defendants, and no action taken by the defendants in consequence thereof, could change the previous existing relations. The cases cited by counsel do not sustain the proposition he seeks to establish in this case. They do not go further than to hold that where the plaintiff has two inconsistent remedies and adopts one of them he cannot afterwards resort to the other. The referee's conclusion upon the whole case, and the judgment entered in pursuance thereof, are correct. *Central Nat. Bk. v. White*, 257.

2. *Held*, that defendant could not have the benefits of a valid contract without bearing its burdens. She could not be permitted to affirm in part, and rescind in part. The trial judge properly compelled the defendant to elect either to stand on her alleged counter-claim and affirm the con-

tract, or to abandon the counter-claim and stand upon the alleged facts as a defence. The offered evidence of preparations made by defendant was properly excluded. The only theory on which such evidence might be admissible is that it would show defendant's belief in the representations made. But no representation is available for that purpose unless it is a representation as to an existing material fact, and the representations relied upon for rendering the excluded evidence admissible related to mere expectations and not to existing material facts. If defendant wished to rely upon the representations of expectations which she claimed the plaintiff's committee made to her, she should have exacted a guaranty of the number to be present or a guaranty of profits. *Societa Italiana, etc., v. Sulzer*, 325.

#### ELEVATED RAILROADS.

1. In an action to secure relief by way of injunction and incidental rental damages against the defendants' elevated railway in First avenue in the city of New York, it was shown that plaintiff was the owner of premises situated on the southeast corner of First avenue and Eighth street; that the station and platform of the defendants' elevated railway at First avenue and Eighth street was immediately in front of said premises, and that said station and the columns supporting it projected about two feet beyond the easterly house line of First avenue into Eighth street. The trial court directed the entry of a judgment enjoining the further maintenance and operation of defendants' railway and station in front of said premises, awarding a certain sum as damages for past trespasses and providing that the injunction should not be operative as to the structure and portion of the station in First avenue in case defendants, within a time specified, paid to plaintiff the sum of \$5,000, adjudged to be the value of easements taken, but directing defendants within a certain time to take down and remove such portion of said station as projected into Eighth street beyond the easterly house line of First avenue. *Held*, that the defendants can exercise only such power as the Legislature has given them; that when the route is designated the defendants must keep the whole and every part of their structure, of whatsoever nature the same may be, within the confines of the line. The onus was upon the defendants to show some grant which permitted them to diverge from the line of their route into Eighth street and erect a station projecting two feet beyond the easterly line of First avenue. No such permission was shown, and that portion of the structure must, therefore, be assumed to have been built and maintained without the semblance of right (not as a *temporary* privilege but permanent erection), and the court below properly directed its removal. *Adler v. Met. El. Ry. Co.*, 85.
2. In the construction of grants of franchises such grants are generally construed most favorably to the public and most strongly against the grantee; nothing as a rule passes except what is expressed in unequivocal language. It follows, from the application of this rule, that as Eighth street was not included in the route designated by the rapid transit commissioners, and was not essential to the enjoyment of the franchise, it is, therefore, to be regarded as excluded. *Ib.*
3. The maxim *De minimis non curat lex* is never applied to the positive and wrongful invasion of another's property. The degree is wholly immaterial. Two feet of

land in a thickly populated portion of a city is not so trifling as to deny the injured party the legal remedies necessary or proper for asserting the right of property thereto or to redress any trespass thereon. *Ib.*

4. *Held*, that the evidence satisfactorily sustains the findings of the court below both as to past damages and the value of the easements taken by the railway and station in First avenue. *Ib.*
5. In an action to secure an injunction and incidental damages against an elevated railroad with respect to premises on Park Row, the trial judge refused to find at defendants' request that the station in Park Row near plaintiff's premises and the great number of people drawn thereby to the vicinity of plaintiff's premises constituted a special benefit thereto from the same. *Held*, no error. The request involved a question of fact whether the persons drawn into the vicinity of plaintiff's premises were likely to become customers at the same, which fact further depended on the occupations, means, and places of home and business of the passers-by. The refusal of the judge to find upon this question of fact cannot be disturbed. *Bischoff v. N. Y. Elevated R. R. Co.*, 211.
6. A portion of the premises in suit, known as No. 20 Duane street, is not so cut off from the advantage of light and air from Park Row by solid separating walls without openings as to deprive such portion of easements in Park Row, the first floor of No. 20 Duane street being the continuation of a floor in No. 1 Chambers street. Beyond this, No. 20 Duane street in its front had an easement which was not limited to Duane street but extended easterly to Park Row. *Ib.*
7. The plaintiff put in evidence the rents of Sweeny's hotel, situated

on Park Row, a short distance from plaintiff's premises, from 1879 to the time of the trial. The defendants objected to this evidence as indefinite, irrelevant, and not within the issues in this action. *Held*, that it was within the scope of the action to ascertain what the effect of the railroad had been upon Park Row either in decreasing or increasing rental or fee values. There was no special objection taken because the rent was a matter of bargaining between others than the parties to this suit. For want of a particular objection, the action of the court should be sustained. The dissimilarity of the hotel from the premises in suit in respect of structure and kind of occupation, was immaterial to the inquiry of whether, in a course of years rents on Park Row had increased or decreased. *Ib.*

8. The plaintiff called as a witness one Harnett, who testified as to the value of real estate. On cross-examination, he was asked by defendants' counsel, can you give the value of Mr. Bischoff's building? The answer was, that he supposed the building to-day would sell for about \$60,000 or \$65,000. He further testified that another building in Park Row sold for \$85,000, and that plaintiff's building was a little larger than the other. Defendants' counsel then asked: "Q. Is it on account of the difference in the building that you make the \$25,000 difference?" The answer was: "I make the damage the elevated railroad has done." On re-direct examination plaintiff's counsel asked: "Q. In estimating for counsel for defendants you said you allowed so much for damage from elevated road to plaintiff's property. How much did you allow?" The question was objected to as asking for the opinion of the witness as to the damage. The court

- also asked: "How much did you allow in the estimate already given?" The witness answered: "I stated from \$60,000 to \$65,000. I stated the damage done from \$30,000 to \$35,000. In other words, I think the property would sell for \$100,000, if put up at auction to-day, if the elevated road was not there. That is the way I made up my estimate." The defendants' counsel asked that the latter part of the answer be stricken out, as irresponsible and incompetent. *Held*, that the plaintiff could not properly be prevented asking the particulars of the evidence drawn out by the defendants. There was no new subject alluded to. He had already given in substance what he believed the property to be worth without the railroad, for he said it was worth then \$60,000 to \$65,000 and \$25,000 damages had been done. His last answer increased the amount. That would afford matter for observation upon the witness' testimony but would not make the testimony incompetent. Whatever the purpose of the defendants in asking the question, the plaintiff had a right to examine to frustrate that purpose if possible. And a failure on the part of the plaintiff to accomplish this would not make questions they had asked incompetent. *Ib.*
9. At the time the plaintiff purchased the premises in 1884, there was an outstanding lease on the premises which had still three years to run. *Held*, that it was proper to award the plaintiff rental damages during that period. *Ib.*
10. For the purpose of showing the rents of certain properties in the vicinity of plaintiff's premises, in an action to secure damages to rental value by an elevated railroad, and thereby to establish a course of rental value, it is competent to put in evidence entries of rents received, made in the handwriting of deceased owner of the premises, in books kept for that purpose, even though unauthenticated by any direct proof as to the time when they were made or as to the knowledge possessed by the person making them. The entries having been made prior to the coming of the elevated railroad, it is not to be supposed that decedent would have had any motive for falsifying his entries in contemplation of bringing a suit for loss of rental value against the elevated railroad company. The entries were made in the ordinary course of business by a third person now dead; they related to matters presumably within his peculiar knowledge and were to a certain extent admissions against his interest. There was apparently no particular motive to prevent the facts. *Greenwood v. Met. El. Ry. Co.*, 253.
11. The plaintiffs also sought to establish certain rentals by putting in evidence certain written leases duly executed and recorded but unauthenticated by any proof of possession under them or payment of the stipulated rent. *Held*, that the objections to the leases were properly overruled. While not conclusive, the agreed rent is a strong evidence of the real value of the use and occupation, and is worthy of admission as evidence. Where a lease is properly executed and recorded the presumption is that it is *bona fide*; and the burden of proof was upon defendants to show that there were separate arrangements allowing the lessees to pay less than the rents called for by the leases, or that the leases were never acted upon. *Schule v. Cunningham*, 54 N. Y. Super Ct., 302, distinguished. *Ib.*
- Practice*—Marking requests to find pursuant to section 1023 of the Code of Civil Procedure—When

*general endorsement at foot of finding sufficient. See Hunter v. Manhattan Ry. Co., 812.*

*Easements taken by elevated railroad—valuation thereof by trial court will be reviewed by general term and if not sustained by the evidence, the injunction may be modified by suspending its operation for a reasonable time to enable the defendants to take condemnation proceedings. Blumenthal v. N. Y. Elevated R. R. Co., 42 N. Y. State Rep., 683, followed. Judgment also modified by deducting from the money part thereof, so much of the extra allowance as was based on the sum fixed as the valuation of the easements. See Bolger v. Met. El. Ry. Co., 459.*

#### EQUITY.

1. This action was in equity to set aside the cancellation of a policy of marine insurance and recover for the loss of a vessel which occurred without the knowledge of the parties and prior to the loss.—*Held*, that plaintiff required no equitable relief, assuming that the cancellation operated as to future liability only, but the plaintiff assumed that equitable relief was necessary to reinstate the parties to their position prior to the cancellation, but the defendant not having raised the objection in his answer that equitable relief was unnecessary, cannot raise it now, and, therefore, it may be assumed that the plaintiff was properly in equity in his action, and that branch of the court obtained complete jurisdiction in the controversy. *Duncan v. N. Y. Mut. Ins. Co., 13.*
2. In an action for conversion of certain lithographic stones, *Held*, that the complaint was properly dismissed, because of the failure of the plaintiff to establish a title to the lithographic stones. The

action being for conversion, the plaintiff was bound to establish title. The stones must be regarded as the principal, and the impressions thereon as a mere incident, and the plaintiff could not maintain conversion based upon the refusal of the defendant to deliver up the impressions and an offer to pay the value of the stones. A delivery of the impressions cannot be made without giving up the stones also, nor is a mere refusal to permit a transfer to be made of the impressions sufficient to sustain the action. Conversion would only lie upon proof of the destruction of the plaintiff's interest in the impressions. Short of that, and under the special circumstances of this case, the plaintiff's remedy against the defendant is in equity. *Knight v. Sackett & Wilhelms L. Co., 219.*

*Demurrer to complaint in action in equity to vacate and set aside a judgment as being founded in fraud, etc. See Woodruff v. Johnston, 348.*

#### ESTOPPEL.

1. The agreement provided for the payment of one hundred and fifty shares of capital stock of the Staten Island Water Supply Company, when the water works that the defendants' testator were building under contract were turned over and accepted by said company. Before the water works had been accepted, and before the completion of the contract in regard to them, defendants' testator assigned his contract to another party and procured a release from the company. *Held*, that on the face of the contract, and from extrinsic circumstances, it appears that the acceptance was referred to only as a date or time of payment of the capital stock. It also appears that the testator was solely

responsible for the acceptance never taking place. He could not by his own act dissolve the obligation of the contract, and his executors are liable upon it. *Smith v. Lockwood*, 114.

2. Between June, 1866, and July, 1869, plaintiff made purchases and sales of stocks, securities and gold, through the defendants, as brokers, and these dealings were managed and directed by Sanford, who gave all orders to defendants that were brought to their office by plaintiff's clerks or messengers, and defendants were constantly receiving cashier checks, drawn by W. H. Sanford, Cashier, upon the plaintiff, which were paid by plaintiff in the usual course of business through the clearing house. The defendants received in such dealings upwards of one hundred such checks, aggregating half a million of dollars, and no question or objection to the payment of these checks was ever made until July 1, 1869, when Sanford absconded after appropriating to his own use stocks, securities and moneys, of plaintiff and its customers. This action seeks to recover from defendants the amount of fourteen of the checks, selected out of the one hundred checks by plaintiff's counsel, on the ground that the money represented by these checks, and so paid to defendants, were for use in Sanford's private stock speculations, and that defendants knew actually or constructively what Sanford was doing. After Sanford's defalcation the plaintiff called upon defendants and was permitted to see Sanford's accounts, as kept by defendants, and then informed the latter that Sanford had been speculating on his own account. After receiving this information, defendants discovering certain balances in favor of Sanford with other brokers, they brought an action against him and recovered about

\$2,000, by default, upon the theory that the transactions in question were with Sanford individually, and that he was their customer and not the plaintiff. Plaintiff's counsel claimed that this action by defendants against Sanford, and the judgment entered and enforced against Sanford's individual property, constituted an election by defendants to consider Sanford as their customer in these transactions, and precludes the defendants from insisting that the plaintiff and not Sanford was their customer in these transactions in question, and that such act precludes them from contesting that question in this action. *Held*, that this legal proposition of the plaintiff's counsel cannot be sustained either by principle or by authority. The doctrine invoked is "the election of remedies." This doctrine cannot be invoked and made available beyond the point of precluding the defendants, after suing Sanford on the account, from proceeding against the plaintiff to recover any balance not realized in judgment against Sanford. Such action on the part of the defendants cannot create a remedy in favor of the plaintiff that did not exist before the action. The relations between the bank and defendants existed and were fixed before Sanford absconded, and if the dealings before that time were with the bank, nothing that plaintiff's president said to defendants, and no action taken by the defendants in consequence thereof, could change the previous existing relations. The cases cited by counsel do not sustain the proposition he seeks to establish in this case. They do not go further than to hold that where the plaintiff has two inconsistent remedies and adopts one of them he cannot afterwards resort to the other. The referee's conclusion upon the whole case, and

the judgment entered in pursuance thereof, are correct. *Central Nat. Bk. v. White*, 257.

### EVIDENCE.

1. Promissory note, defence thereto; that it was made and endorsed without consideration for the accommodation of one Simmons, and diverted by him from the purpose for which it was entrusted to him, and the evidence fully supported that position and required the plaintiff to show that it paid value for the paper, and the single and main point in the case was whether, upon the evidence, the plaintiff was entitled to go to the jury upon the question as to whether it parted with value upon the faith of the note. *Held*, that the evidence established that the plaintiff neither paid nor surrendered anything of value on the faith of the note in suit, and there was nothing to go to the jury on any of the questions involved in the action, and the verdict for the defendants was properly directed. *Sixth Nat. Bank v. Lorillard Brick Works Co.*, 29.
2. Plaintiff is the beneficiary named in a certificate of membership issued by plaintiff, by the terms of which \$1,000 became payable to plaintiff on the death of her sister. The decedent was admitted to membership December 26, 1888, and died March 24, 1890. In her application for membership she represented herself to be in good health and not suffering from cancer. There was a breach of the warranty contained in the application, as claimed by defendant, based upon the certificate of death that was furnished by Dr. Lewis, her attendant physician, on March 24, 1890, which stated that the chief cause of death was cancer of the uterus, and the duration of the disease two years, which

would indicate that the decedent had been troubled with that disease prior to and at the time of her application and admission as a member of defendant's society. The main question in the case, is whether such certificate, unimpeached and uncontradicted, conclusively established the breach of warranty claimed by the defendant. *Held*, that the statement in the certificate must be taken rather as an expression of opinion of the physician, and as such, in no sense conclusive evidence of the fact stated. There is nothing in the act of 1882 (§ 604) requiring the physician to certify to the "duration of the disease," so that his opinion that the duration of the disease was two years was not called for by article 9, section 1, of the constitution and by-laws of the defendant, interpreted in the light of the statute; hence such opinion does not rise to the dignity of evidence *prima facie* or otherwise. *Muller v. Orden Germania*, 43.

3. *Held*, that aside from *ex parte* petitions and the like, any publication made in the ordinary course of judicial proceedings is privileged if the article be a fair and impartial account thereof. Although the publication may be to the disadvantage of the particular suitor, the paramount advantage to the public fully justifies the end attained. The truth irrespective of motives is a complete justification to a civil action for libel. Every one has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. Such comments are not libelous, however severe in their terms, unless they are written maliciously. Report and comment are two separate and distinct things. A report is the mechanical reproduction of what actually took place. Comment is the judg-

ment passed upon the circumstances reported by one who has considered the same. Fair reports are privileged, while fair comments are no libels at all. Blending the report and comments together does not make the matter libelous if it would not be so if the one was separated from the other. The report in this case is within the protection of privileged publications, and the comments are justified by the facts disclosed. The plaintiff could only recover upon affirmative proof of malice, and there is an entire absence of that essential element in the case. *Johns v. Press Publishing Co.*, 207.

4. In an action to secure an injunction and incidental damages against an elevated railroad with respect to plaintiff's premises on Park Row the plaintiff put in evidence the rents of Sweeny's hotel, situated on Park Row, a short distance from plaintiff's premises, from 1879 to the time of the trial. The defendants objected to this evidence as indefinite, irrelevant, and not within the issues in this action. *Held*, that it was within the scope of the action to ascertain what the effect of the railroad had been upon Park Row either in decreasing or increasing rental or fee values. There was no special objection taken because the rent was a matter of bargaining between others than the parties to this suit. For want of a particular objection, the action of the court should be sustained. The dissimilarity of the hotel from the premises in suit in respect of structure and kind of occupation, was immaterial to the inquiry of whether, in a course of years, rents on Park Row had increased or decreased. *Bischoff v. N. Y. Elevated R. R. Co.*, 211.
5. The plaintiff called as a witness one Harnett, who testified as to the value of real estate. On cross-

examination, he was asked by defendants' counsel, can you give the value of Mr. Bischoff's building? The answer was that he supposed the building to-day would sell for about \$60,000 or \$65,000. He further testified that another building in Park Row sold for \$85,000, and that plaintiff's building was a little larger than the other. Defendants' counsel then asked: "Q. Is it on account of the difference in the building that you make the \$25,000 difference?" The answer was "I make the damage the elevated railroad has done." On re-direct examination plaintiff's counsel asked: "Q. In estimating for counsel for defendants you said you allowed so much for damage from elevated road to plaintiff's property. How much did you allow?" The question was objected to as asking for the opinion of the witness as to the damage. The court also asked: "How much did you allow in the estimate already given?" The witness answered, "I stated from \$60,000 to \$65,000. I figured the damage done from \$30,000 to \$35,000. In other words, I think the property would sell for \$100,000, if put up at auction to-day, if the elevated road was not there. That is the way I made up my estimate." The defendant's counsel asked that the latter part of the answer be stricken out, as irresponsible and incompetent. *Held*, that the plaintiff could not properly be prevented asking the particulars of the evidence drawn out by the defendants. There was no new subject alluded to. He had already given in substance what he believed the property to be worth without the railroad, for he said it was worth then \$60,000 to \$65,000 and \$25,000 damages had been done. His last answer increased the amount. That would afford matter for observation upon the witness' testi-

mony but would not make the testimony incompetent. Whatever the purpose of the defendants in asking the question, the plaintiff had a right to examine to frustrate that purpose if possible. And a failure on the part of the plaintiff to accomplish this would not make questions they had asked incompetent. *Ib.*

6. Upon the trial of the issues the trial judge, after hearing part of the testimony offered by the plaintiffs refused to hear the remainder, and dismissed the complaint upon the ground that the lease did not give the exclusive use of the entrance and hallway to the stairway leading to the premises leased to the plaintiffs, and did not prohibit the cutting and use of a door by the defendant, from the hallway into the saloon. This ruling was erroneous, as it was based upon the theory or conclusion of the judge that the lease itself constituted the whole contract between the parties, and that inasmuch as the lease did not in terms grant to plaintiffs the exclusive use and control of said hallway, evidence of a prior or contemporaneous oral agreement concerning said hallway was inadmissible, and so far as such evidence had been permitted to be given it must be disregarded. *Lynch v. Hunneke*, 235.

7. The general rule which excludes conversations, negotiations and parol agreements, prior to the execution of a written agreement relating to and springing out of such conversations, negotiations, etc., does not apply to this case. (2) When the original contract, although verbal, yet was entire, and only a part of it was reduced to writing, then all the part not so reduced can be proved by parol. (5) When the consideration, or a consideration further than that expressed in the writing, does not appear in the

writing, the consideration or the further consideration may be proved by parol. Parol evidence is always admissible as to the meaning which the parties themselves attached to a particular word or phrase in the contract. Such evidence does not contradict or vary the terms of the written contract, but is simply explanatory thereof. *Ib.*

8. The lease in question was for six lofts above the first floor. "*together with the appurtenances.*" These words gave to the plaintiffs whatever was attached to or used with the premises as incident thereto, and convenient or essential to the beneficial use and enjoyment thereof, and the plaintiffs took thereby any easement or servitude used or enjoyed with the leased premises; and as the appurtenances were not specified, parol evidence was admissible to show that the parties, preparatory to the execution of the lease, met and discussed their character and extent, and agreed that the appurtenances should include all that they appeared to include, and that the defendant would not make a change in such appurtenances in derogation of his grant; and that in strict reliance upon the promise of the defendant, not to change the appurtenances as they then existed and were understood, the plaintiffs executed the lease. *Ib.*

9. Parol evidence to this effect was partly given and partly offered to be given, but rejected. The plaintiffs did show that before the lease was executed the defendant proposed that, by express terms in the lease, he should reserve the right of cutting a door from the hall into the saloon, to which plaintiffs strenuously objected, and defendant expressly waived the point in plaintiffs' favor. It must be assumed in this case that if the plaintiffs had been

permitted to give in all the evidence competent under the issues, within the rules stated, they would have made out a *prima facie* case entitling them, in the absence of evidence to the contrary, to relief against the injurious use of the hall leading to their premises, or of the side door that was cut from said hall into the saloon. *Ib.*

10. For the purpose of showing the rents of certain properties in the vicinity of plaintiff's premises, in an action to secure damages to rental value by an elevated railroad, and thereby to establish a course of rental value, it is competent to put in evidence entries of rents received, made in the handwriting of deceased owner of the premises, in books kept for that purpose, even though unauthenticated by any direct proof as to the time when they were made or as to the knowledge possessed by the person making them. The entries having been made prior to the coming of the elevated railroad, it is not to be supposed that decedent would have had any motive for falsifying his entries in contemplation of bringing a suit for loss of rental value against the elevated railroad company. The entries were made in the ordinary course of business by a third person now dead; they related to matters presumably within his peculiar knowledge and were to a certain extent admissions against his interest. There was apparently no particular motive to pervert the facts. *Greenwood v. Met. El. Ry. Co.*, 253.

11. The plaintiffs also sought to establish certain rentals by putting in evidence certain written leases duly executed and recorded but unauthenticated by any proof of possession under them or payment of the stipulated rent. *Held*, that the objections to the leases were properly overruled. While not conclusive,

the agreed rent is a strong evidence of the real value of the use and occupation, and is worthy of admission as evidence. Where a lease is properly executed and recorded the presumption is that it is *bona fide*; and the burden of proof was upon defendants to show that there were separate arrangements allowing the lessees to pay less than the rents called for by the leases, or that the leases were never acted upon. *Schule v. Cunningham*, 54 N. Y. Super. Ct., 302, distinguished. *Ib.*

12. A new trial cannot be obtained either for the purpose of furnishing new and additional cumulative evidence, nor for the purpose of destroying the cumulative evidence, of the successful party. This rule is well settled, that if a witness examined on commission is instructed by the party in interest how to testify, the commission will be suppressed at the instance of the adverse party, on the ground that such conduct is prejudicial to him, corrupting to the witness, an abuse of process and a fraud on the court, interfering with pure administration of justice. But suppressing a commission in advance of the trial and granting a new trial after judgment, are quite different things. A judgment is intended to terminate a litigation and to conclude the parties as to every question raised or which might have been raised before the final result was reached, and rights so lost may never be regained. *Michel v. Colegrove*, 280.

13. Upon a former trial of this action the court held, that two papers introduced in evidence, one a receipt and the other a deposit *in escrow*, established a contract for the sale of the Kentucky lands from defendant to Wolfe and Millikin, and that all prior negotiations merged in these two papers, and directed a

judgment in favor of plaintiff, awarding him his commissions. The defendant insisted, upon that trial, "that there was an unexpressed condition upon which the writings were delivered," and asked to prove that condition, and so established what defendant claimed was the whole and complete contract between the parties. This parol evidence offered was rejected by the court on the ground that the writings named were conclusive. When the case reached the Court of Appeals, that court held that this ruling rejecting the parol evidence was erroneous, and for the error reversed the judgment. The Court of Appeals also held that there arose a question of fact for the jury which should have been submitted under proper instructions. Upon the new trial the evidence that had been rejected upon the former trial was admitted, and upon the question of fact that it raised, the jury found adversely to defendant upon sufficient evidence. *Held*, that whether the transaction was or was not a sale, was upon all the evidence a question for the jury, as was also the question of plaintiff's instrumentality in bringing it about, and the jury having found these facts in favor of the plaintiff, he became, in law, entitled to his commissions. *Condict v. Cowdrey*, 315.

14. *Held*, that defendant could not have the benefits of a valid contract without bearing its burdens. She could not be permitted to affirm in part, and rescind in part. The trial judge properly compelled the defendant to elect either to stand on her alleged counter-claim and affirm the contract, or to abandon the counter-claim and stand upon the alleged facts as a defence. The offered evidence of preparations made by defendant was

properly excluded. The only theory on which such evidence might be admissible is that it would show defendant's belief in the representations made. But no representation is available for that purpose unless it is a representation as to an existing material fact, and the representations relied upon for rendering the excluded evidence admissible related to mere expectations and not to existing material facts. If defendant wished to rely upon the representations of expectations which she claimed the plaintiff's committee made to her, she should have exacted a guaranty of the number to be present or a guaranty of profits. *Societa Italiana, etc., v. Sulzer*, 325.

*Evidence—Negligence. Proof of subsequent admissions by witness, the servant of defendants, denied on cross-examination, and inconsistent with direct testimony, when competent. In an action for personal injuries caused by the alleged negligent management of defendants' truck whereby plaintiff was run over at 108th street and 4th avenue, the driver testified in behalf of defendants that no unusual accident was brought to his attention except when he was arrested. He was arrested at 125th street and denied, on cross-examination and over objection by defendants, having asked the police officer "Is this the 108th street racket?" Held that the testimony of the police officer in rebuttal that the driver asked said question was competent. See Barrett v. Smith, 458.*

#### EXAMINATION BEFORE TRIAL.

The order appealed from was an order of the special term, denying a motion made by defendant to vacate an order previously

test involved whether the into the vicin- premises were customers at the act further depend- occupations, means, of home and business ers-by. The refusal dge to find upon this of fact cannot be dis- *Bischoff v. N. Y. Ele- R. R. Co.*, 211.

action was for an injunction incidental damages against defendants' elevated railroad. The trial court failed to note its disposition of the proposed find- ings of fact and conclusions of law in the margin opposite each proposition as required by section 1023 of the Code of Civil Proce- dure, but endorsed upon the pro- posed findings and conclusions the following ruling: "Each of the within requests is to be marked 'Refused,' except so far as covered by the findings of fact and conclusions of law settled and signed by me." *Held*, that while this mode of passing upon defendants' propositions was not in strict compliance with the pro- visions of section 1023 of the Code of Civil Procedure, the court did indicate the manner in which each proposition had been dis- posed of and hence complied sub- stantially with the statute. The question, however, is not prop- erly presented by the record to the general term. The better practice would have been to ap- ply to the court below to have the omission complained of sup- plied, or the mistake, if one, cor- rected, and, in case of refusal, to have made the application and refusal a part of the record. *Hunter v. Manhattan Ry. Co.*, 812.

FIRE DEPARTMENT.

See CERTIORARI.

mina- trial. restrict us as to the place of the acci- v. Second

LOWANCE.

COSTS.

NGS OF FACT.

on to secure an injunc- incidental damages an elevated railroad with premises on Park Row, judge refused to find at ants' request that the sta- Park Row near plaintiff's ses and the great number ople drawn thereby to the city of plaintiff's premises tituted a special benefit to from the same. *Held*, 32

## FRAUD.

1. There were no material misrepresentations made by defendants to induce the plaintiff to execute the bill of sale in this case. Plaintiff intended to give defendants security for their demands against him, and it was executed in the form of a bill of sale, when a chattel mortgage might have been more appropriate for the purpose intended. After the defendants received the bill of sale, they asserted their rights under it, sooner than the plaintiff expected, and plaintiff's store and stock in trade, etc., were sold to satisfy defendants' claims. This action was to set aside the bill of sale on the ground of fraud. *Held*, that the bill of sale was not procured by fraudulent representations as to material facts, and should not be set aside, and, therefore, the complaint was properly dismissed. Although the bill of sale was absolute on its face, it was clearly intended as security for the debt by way of mortgage and not as a satisfaction thereof, and if this action had been to declare it as a mere security for the sum due and for an accounting of the proceeds of sale, it would have been maintained; but this action is founded on fraud to avoid the instrument altogether and for damages, as if no writing whatever had been executed or intended to be executed. The plaintiff is not entitled on the evidence in the case to the broad relief claimed. *Schelling v. Bischoff*, 68.
2. The object of this action was to obtain a judgment of this court, to the effect, that certain pieces of real estate, the title to which, at the time of the death of Isaac L. Pinckney, stood in the name of his widow, Henrietta Pinckney, were equitably a part of the estate of Isaac L. Pinckney when he died. These pieces had been duly conveyed to Henrietta Pinckney at the request of her husband, who paid the consideration for the same. The plaintiffs claimed that the conveyances in question created a trust in said Henrietta Pinckney to consider and treat and dispose of the same, as the property and estate of Isaac L. Pinckney, under his last will and testament, in which he appointed the said Henrietta as sole executrix. The plaintiffs also claimed that said Henrietta Pinckney had accepted such grants on her promise that she should hold the said real estate in trust and not as her own absolute property. The court held that no promise had been proved, and that if it had been so proved it would have been void, as also would have been the so-called and claimed trust. That if such an oral promise or oral trust had been established, it would not have been fraud on the part of the grantee to have refused to recognize the validity of either. The inference from the whole testimony in the case is, that Isaac L. Pinckney did intentionally what he did do, or cause to be done, in regard to the conveyances, intending and meaning that his action in the premises should have its full legal effect. *Watson v. Pinckney*, 188.
3. This action was brought to recover from defendant the sum of \$10,000, upon a policy of insurance upon the life of Charles H. Hyde, payable upon his death to the firm of Studwell, Sanger & Co., of which firm plaintiffs are the sole surviving partners. The application for insurance, and the statements therein, and the by-laws of respondent, by the terms of the policy were made a part of the contract of insurance between Hyde and the defendant. The defence was based upon alleged misrepresentations in the application for insurance or the suppression of facts therein which should have been stated.

In the application Mr. Hyde made this declaration: "That the foregoing application and this declaration, together with the answers and explanation given to the above various questions, and inclusive of those propounded by the medical examiner on the within pages hereof, shall form the exclusive and only basis of the agreement of the above-named applicant and the Mutual Benefit Life Association of America, and that *if any misrepresentations or fraudulent or untrue answers or statements have been made, or if any facts which should have been stated to the association have been suppressed therein, \* \* \** or should the applicant fail to comply with any of the terms of this agreement, or with any of the conditions and agreements contained in the certificate of membership, \* \* \* *then this agreement shall become null and void*, and all moneys which shall have been paid shall be forfeited to the said Association for its sole benefit." At the conclusion of the statement made to the medical examiner, Mr. Hyde further says: "I hereby further declare that I have read and understand all of the foregoing questions put to me by the medical examiner, and the answers thereto, and that the same are warranted by me to be true." In the application for insurance this question was asked of Mr. Hyde: "What amounts are now insured on your life, and in what companies? A. \$10,000 'Family Fund.'" The plaintiffs' proofs of death submitted to the defendant show that Mr. Hyde had \$10,000 insurance in the "Mutual Life Insurance Company of New York." Defendant's "Exhibits B, C, E and F" are conclusive evidence of the falsity of this statement. They show that on January 30, 1868, and several years prior to the application made to the defendant, Mr. Hyde

took out two policies of insurance in the "Mutual Life Insurance Company of New York" for \$5,000 each, and that the same were in full force right along up to the time Mr. Hyde died, and that the amounts insured by said policies were actually paid to Mr. George H. Studwell, one of the plaintiffs in this action, on the 24th day of January, 1890. These policies were offered and received in evidence, and the fact that, in addition to the insurance mentioned by Mr. Hyde in his application, he was also insured at the time of that application for the sum of \$10,000 in the "Mutual Life Insurance Company of New York" is not disputed. The answer upon its face appeared to be complete, and it does not, therefore, come within the rule of those cases which hold that where an answer is manifestly incomplete upon its face, the insurers will be deemed to have waived the right to a more complete answer if they make no further inquiry in relation thereto. This answer was complete and full upon its face, and there was nothing in it which could have possibly required, induced or provoked further inquiry in relation to the subject matter of this particular question. At the conclusion of the evidence defendant moved to dismiss the complaint upon the ground, among others, that Mr. Hyde, in his answers made and contained in the application, suppressed the fact that he was insured in the Mutual Life Insurance Company for \$10,000, and the trial judge dismissed the complaint solely upon that ground. *Held, on appeal*, that the policy in suit and the application therefor constituted the contract for insurance between Charles H. Hyde and defendant. The evidence disclosed, and it incontestably appeared, that a material fact had been suppressed which should have

been stated to the association under the contract, and there could be no other reasonable conclusion than that he knew of the existence of the policies from the Mutual Life Insurance Company and intentionally suppressed the fact. It would be unreasonable to call upon defendant, years after these policies had been issued and the facts that had transpired leading to their issue had occurred, to give positive and direct proof of the intentional omission on the part of the insured of a fact which by the terms of the contract the insured had agreed to place in defendant's possession, and it follows that plaintiffs were not entitled to recover, and the dismissal of the complaint did not constitute error. *Studwell v. Mut. Benefit Life Ass'n.* 287.

*Demurrer to complaint in action in equity to vacate and set aside a judgment as being founded in fraud, etc.* See *Woodruff v. Johnston*, 348.

See TRIAL, 18.

#### GUARANTY.

*Contract of guaranty—Action to recover dividends at the rate of 7% per annum, on \$150,000 of the capital stock of the Philadelphia and New York Steam Navigation Company.* See *Lorillard v. Clyde*, 428.

#### INJUNCTION.

In an action for interpleader and injunction, *Held*, that the plaintiff is not entitled to an interpleader, and, therefore, no right to the injunction sought existed. and the motion for an injunction was properly denied. *German Savings Bank v. Friend*, 400.  
*Easements taken by elevated railroad—Valuation thereof by trial*

*court will be reviewed by general term, and if not sustained by the evidence, the injunction may be modified by suspending its operation for a reasonable time to enable the defendants to take condemnation proceedings.* *Blumenthal v. N. Y. Elevated R. R. Co.*, 42 N. Y. State Rep., 683, followed. See *Bolger v. Met. El. Ry. Co.*, 459.

#### INSURANCE.

##### (LIFE.)

1. Plaintiff is the beneficiary named in a certificate of membership issued by plaintiff, by the terms of which \$1,000 became payable to plaintiff on the death of her sister. The decedent was admitted to membership December 26, 1888, and died March 24, 1890. In her application for membership she represented herself to be in good health and not suffering from cancer. There was a breach of the warranty contained in the application, as claimed by defendant, based upon the certificate of death that was furnished by Dr. Lewis, her attendant physician, on March 24, 1890, which stated that the chief cause of death was cancer of the uterus, and the duration of the disease two years, which would indicate that the decedent had been troubled with that disease prior to and at the time of her application and admission as a member of defendant's society. The main question in the case, is whether such certificate, unimpeached and uncontradicted, conclusively established the breach of warranty claimed by the defendant. *Held*, that the statement in the certificate must be taken rather as an expression of opinion of the physician, and, as such, in no sense conclusive evidence of the fact stated. There is nothing in the act of 1882 (§ 604) requiring

the physician to certify to the "duration of the disease," so that his opinion that the duration of the disease was two years was not called for by article 9, section 1, of the constitution and by-laws of the defendant, interpreted in the light of the statute; hence such opinion does not rise to the dignity of evidence *prima facie* or otherwise. Upon the submission to the jury of this question upon the evidence and the verdict, finding there was no misrepresentation by the decedent, and that she was not in ill health at the time she joined the order, the judgment and order appealed from must be affirmed. No error found in the case. *Muller v. Orden Germania*, 43.

2. This action was brought to recover from defendant the sum of \$10,000, upon a policy of insurance upon the life of Charles H. Hyde, payable upon his death to the firm of Studwell, Sanger & Co., of which firm plaintiffs are the sole surviving partners. The application for insurance, and the statements therein, and the by-laws of respondent, by the terms of the policy were made a part of the contract of insurance between Hyde and the defendant. The defence was based upon alleged misrepresentations in the application for insurance or the suppression of facts therein which should have been stated. In the application Mr. Hyde made this declaration: "That the foregoing application and this declaration, together with the answers and explanation given to the above various questions, and inclusive of those propounded by the medical examiner on the within pages hereof, shall form the exclusive and only basis of the agreement of the above-named applicant and the Mutual Benefit Life Association of America, and that if any misrepresentations or fraudulent or untrue answers or statements

have been made, or if any facts which should have been stated to the association have been suppressed therein, \* \* \* or should the applicant fail to comply with any of the terms of this agreement, or with any of the conditions and agreements contained in the certificate of membership, \* \* \* then this agreement shall become null and void, and all moneys which shall have been paid shall be forfeited to the said Association for its sole benefit." At the conclusion of the statement made to the medical examiner, Mr. Hyde further says: "I hereby further declare that I have read and understand all of the foregoing questions put to me by the medical examiner, and the answers thereto, and that the same are warranted by me to be true." In the application for insurance this question was asked of Mr. Hyde: "What amounts are now insured on your life, and in what companies? A. \$10,000 'Family Fund.'" The plaintiffs' proofs of death submitted to the defendant show that Mr. Hyde had \$10,000 insurance in the "Mutual Life Insurance Company of New York." Defendant's "Exhibits B, C, E and F" are conclusive evidence of the falsity of this statement. They show that on January 30, 1888, and several years prior to the application made to the defendant, Mr. Hyde took out two policies of insurance in the "Mutual Life Insurance Company of New York" for \$5,000 each, and that the same were in full force right along up to the time Mr. Hyde died, and that the amounts insured by said policies were actually paid to Mr. George H. Studwell, one of the plaintiffs in this action, on the 24th day of January, 1890. These policies were offered and received in evidence, and the fact that, in addition to the insurance mentioned by Mr. Hyde in his application, he was

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the terms of the contract the insured had agreed to place in defendant's possession, and it follows that plaintiffs were not entitled to recover, and the dismissal of the complaint did not constitute error. *Studrell v. Mut. Benefit Life Ass'n*, 287.

#### (MARINE).

The principal question in this case related to the effect of a cancellation of the policy after the loss of the vessel and before either party had knowledge of the loss. The parties intended to and did cancel the policy, not from the time of its original execution and delivery, but on and after December 3, 1888, the day of its cancellation. The defendant retained the premium for the risk to that time, merely returning the unearned premiums for the unexpired time of the policy. *Held*, that the vessel having been lost prior to the cancellation, the liability of the defendant had become fixed and irrevocable at the time of the loss. The plaintiff did not intend to release, nor did the defendant expect to be released from any liability already incurred and existing, but only from any liability that might occur thereafter. *Duncan v. N. Y. Mut. Ins. Co.*, 13.

#### INTERPLEADER.

In an action for interpleader and injunction, *Held*, that the plaintiff is not entitled to an interpleader, and, therefore, no right to the injunction sought existed, and the motion for an injunction was properly denied. *German Savings Bank v. Friend*, 400.

#### JOCKEY CLUBS.

The contention of the plaintiff in this case was that the colt

"Huron" was sold "*with all his racing engagements*," among which was "The Futurity," and by means of such purchase of the colt, he became entitled to run the said colt in "The Futurity" race on August 29, 1891. At the time of the sale the colt was eligible as a competitor for "The Futurity." In the catalogue of sale the colt was described as "Eligible to Coney Island Futurity, 1891." Upon the verified complaint in the action the special term granted a mandatory injunction directing the defendant to permit a certain horse known as "Huron," the property of the plaintiff, to take part in a race called "The Futurity," on the 29th day of August, 1891. From the order granting the same this appeal is made. *Held*, that the sale of the colt as "Eligible to Coney Island Futurity, 1891" in the description of the colt "Huron," when read in with the conditions of the sale, did not operate as a declaration by the vendor that the colt was sold with his racing engagements, and that representation of eligibility, can hardly be held as one of the conditions of sale, and certainly it would be unreasonable to make the further claim that this description meant a sale of the colt, with all his engagements. If, however, under the facts and circumstances, it may be assumed that the plaintiff did purchase the colt "Huron" with his engagements, and succeeded to all the rights of General Jackson, the vendor, in respect to the colt and "The Futurity" race, and there was a question whether the plaintiff had or had not a right to run the said colt in the Futurity race of 1891, the executive committee of defendant, were the final arbiters, and that committee decided that the said colt was not eligible to star in "The Futurity race of 1891" and that decision

this court will not overturn. Executive committees of jockey clubs and social clubs, are supreme within themselves, when acting within the scope of their recognized legal authority, and the courts will not interfere with their decisions when rendered in accordance with their powers and rights. The statutes of this State give the defendant the right to conduct races at certain specified times, and the right to settle controversies, like the one in question, is just as firmly established, and it has the support of sound principles of equity, declared in a long line of authorities. The executive committee of the corporation-defendant were fully warranted in the decision reached and in the course pursued. *Corrigan v. Coney Island Jockey Club*, 393.

#### JUDGMENT.

1. In an action for conversion tried by consent of parties by the court without a jury, *Held*, that complaint was properly dismissed, but at the dismissal was upon plaintiff's own showing, and without findings, it should not have been dismissed "*upon the merits*," the judgment should be modified by striking out the words "*upon the merits*." *Knight v. Sackett Wilhelms L. Co.*, 219.
2. In an application to vacate a judgment and suppress the deposition of a witness on the ground of newly-discovered evidence the motion was founded upon affidavits. The court below held that such a motion should be made upon a case and exceptions, as well as the affidavits, and therefore denied the motion with leave to renew upon such case. *Held*, that the court below correctly indicated the practice to be followed in such a case, and that the order was prop-

mony but would not make the testimony incompetent. Whatever the purpose of the defendants in asking the question, the plaintiff had a right to examine to frustrate that purpose if possible. And a failure on the part of the plaintiff to accomplish this would not make questions they had asked incompetent. *Ib.*

6. Upon the trial of the issues the trial judge, after hearing part of the testimony offered by the plaintiffs refused to hear the remainder, and dismissed the complaint upon the ground that the lease did not give the exclusive use of the entrance and hallway to the stairway leading to the premises leased to the plaintiffs, and did not prohibit the cutting and use of a door by the defendant, from the hallway into the saloon. This ruling was erroneous, as it was based upon the theory or conclusion of the judge that the lease itself constituted the whole contract between the parties, and that inasmuch as the lease did not in terms grant to plaintiffs the exclusive use and control of said hallway, evidence of a prior or contemporaneous oral agreement concerning said hallway was inadmissible, and so far as such evidence had been permitted to be given it must be disregarded. *Lynch v. Hunneke*, 235.

7. The general rule which excludes conversations, negotiations and parol agreements, prior to the execution of a written agreement relating to and springing out of such conversations, negotiations, etc., does not apply to this case. (2) When the original contract, although verbal, yet was entire, and only a part of it was reduced to writing, then all the part not so reduced can be proved by parol. (5) When the consideration, or a consideration further than that expressed in the writing, does not appear in the

writing, the consideration or the further consideration may be proved by parol. Parol evidence is always admissible as to the meaning which the parties themselves attached to a particular word or phrase in the contract. Such evidence does not contradict or vary the terms of the written contract, but is simply explanatory thereof. *Ib.*

8. The lease in question was for six lofts above the first floor. "*together with the appurtenances.*" These words gave to the plaintiffs whatever was attached to or used with the premises as incident thereto, and convenient or essential to the beneficial use and enjoyment thereof, and the plaintiffs took thereby any easement or servitude used or enjoyed with the leased premises; and as the appurtenances were not specified, parol evidence was admissible to show that the parties, preparatory to the execution of the lease, met and discussed their character and extent, and agreed that the appurtenances should include all that they appeared to include, and that the defendant would not make a change in such appearances in derogation of his grant; and that in strict reliance upon the promise of the defendant, not to change the appurtenances as they then existed and were understood, the plaintiffs executed the lease. *Ib.*

9. Parol evidence to this effect was partly given and partly offered to be given, but rejected. The plaintiffs did show that before the lease was executed the defendant proposed that, by express terms in the lease, he should reserve the right of cutting a door from the hall into the saloon, to which plaintiffs strenuously objected, and defendant expressly waived the point in plaintiffs' favor. It must be assumed in this case that if the plaintiffs had been

permitted to give in all the evidence competent under the issues, within the rules stated, they would have made out a *prima facie* case entitling them, in the absence of evidence to the contrary, to relief against the injurious use of the hall leading to their premises, or of the side door that was cut from said hall into the saloon. *Ib.*

10. For the purpose of showing the rents of certain properties in the vicinity of plaintiff's premises, in an action to secure damages to rental value by an elevated railroad, and thereby to establish a course of rental value, it is competent to put in evidence entries of rents received, made in the handwriting of deceased owner of the premises, in books kept for that purpose, even though unauthenticated by any direct proof as to the time when they were made or as to the knowledge possessed by the person making them. The entries having been made prior to the coming of the elevated railroad, it is not to be supposed that decedent would have had any motive for falsifying his entries in contemplation of bringing a suit for loss of rental value against the elevated railroad company. The entries were made in the ordinary course of business by a third person now dead; they related to matters presumably within his peculiar knowledge and were to a certain extent admissions against his interest. There was apparently no particular motive to pervert the facts. *Greenwood v. Met. El. Ry. Co.*, 253.

11. The plaintiffs also sought to establish certain rentals by putting in evidence certain written leases duly executed and recorded but unauthenticated by any proof of possession under them or payment of the stipulated rent. *Held*, that the objections to the leases were properly overruled. While not conclusive,

the agreed rent is a strong evidence of the real value of the use and occupation, and is worthy of admission as evidence. Where a lease is properly executed and recorded the presumption is that it is *bona fide*; and the burden of proof was upon defendants to show that there were separate arrangements allowing the lessees to pay less than the rents called for by the leases, or that the leases were never acted upon. *Schule v. Cunningham*, 54 N. Y. Super. Ct., 802, distinguished. *Ib.*

12. A new trial cannot be obtained either for the purpose of furnishing new and additional cumulative evidence, nor for the purpose of destroying the cumulative evidence, of the successful party. This rule is well settled, that if a witness examined on commission is instructed by the party in interest how to testify, the commission will be suppressed at the instance of the adverse party, on the ground that such conduct is prejudicial to him, corrupting to the witness, an abuse of process and a fraud on the court, interfering with pure administration of justice. But suppressing a commission in advance of the trial and granting a new trial after judgment, are quite different things. A judgment is intended to terminate a litigation and to conclude the parties as to every question raised or which might have been raised before the final result was reached, and rights so lost may never be regained. *Michel v. Colegrove*, 280.

13. Upon a former trial of this action the court held, that two papers introduced in evidence, one a receipt and the other a deposit *in escrow*, established a contract for the sale of the Kentucky lands from defendant to Wolfe and Millikin, and that all prior negotiations merged in these two papers, and directed a

judgment in favor of plaintiff, awarding him his commissions. The defendant insisted, upon that trial, "that there was an unexpressed condition upon which the writings were delivered," and asked to prove that condition, and so established what defendant claimed was the whole and complete contract between the parties. This parol evidence offered was rejected by the court on the ground that the writings named were conclusive. When the case reached the Court of Appeals, that court held that this ruling rejecting the parol evidence was erroneous, and for the error reversed the judgment. The Court of Appeals also held that there arose a question of fact for the jury which should have been submitted under proper instructions. Upon the new trial the evidence that had been rejected upon the former trial was admitted, and upon the question of fact that it raised, the jury found adversely to defendant upon sufficient evidence. *Held*, that whether the transaction was or was not a sale, was upon all the evidence a question for the jury, as was also the question of plaintiff's instrumentality in bringing it about, and the jury having found these facts in favor of the plaintiff, he became, in law, entitled to his commissions. *Condict v. Cowdrey*, 315.

14. *Held*, that defendant could not have the benefits of a valid contract without bearing its burdens. She could not be permitted to affirm in part, and rescind in part. The trial judge properly compelled the defendant to elect either to stand on her alleged counter-claim and affirm the contract, or to abandon the counter-claim and stand upon the alleged facts as a defence. The offered evidence of preparations made by defendant was

properly excluded. The only theory on which such evidence might be admissible is that it would show defendant's belief in the representations made. But no representation is available for that purpose unless it is a representation as to an existing material fact, and the representations relied upon for rendering the excluded evidence admissible related to mere expectations and not to existing material facts. If defendant wished to rely upon the representations of expectations which she claimed the plaintiff's committee made to her, she should have exacted a guaranty of the number to be present or a guaranty of profits. *Societa Italiana, etc., v. Sulzer*, 325.

*Evidence—Negligence. Proof of subsequent admissions by witness, the servant of defendants, denied on cross-examination, and inconsistent with direct testimony, when competent. In an action for personal injuries caused by the alleged negligent management of defendants' truck whereby plaintiff was run over at 108th street and 4th avenue, the driver testified in behalf of defendants that no unusual accident was brought to his attention except when he was arrested. He was arrested at 125th street and denied, on cross-examination and over objection by defendants, having asked the police officer "Is this the 108th street racket?" Held that the testimony of the police officer in rebuttal that the driver asked said question was competent. See Barrett v. Smith, 458.*

#### EXAMINATION BEFORE TRIAL.

The order appealed from was an order of the special term, denying a motion made by defendant to vacate an order previously

made, requiring defendant to submit to an examination as a witness before the trial on the part of the plaintiff, and the question and facts before the court in the original proceeding are now considered on this appeal. *Held*, that the order must be affirmed, except that the examinations should be limited to the defendant's ownership of the elevator and his relations to the persons who had it in charge at the time of the injury, and the disclosure of the name and address of the physician called by the defendant to attend the plaintiff. The right to such an examination, under the provisions of the Code, is subject to the power of the court to confine the scope of the examination to the legal necessities of the party who seeks it. *Douglass v. Meyer*, 369.

*Action for negligence—Examination of plaintiff before trial. Order for same should restrict examination to questions as to the time when and the place where the alleged accident occurred and as to residence of plaintiff at the time of the accident. See Kinsella v. Second Ave. R. R. Co.*, 454.

#### EXTRA ALLOWANCE.

See COSTS.

#### FINDINGS OF FACT.

1. In an action to secure an injunction and incidental damages against an elevated railroad with respect to premises on Park Row, the trial judge refused to find at defendants' request that the station in Park Row near plaintiff's premises and the great number of people drawn thereby to the vicinity of plaintiff's premises constituted a special benefit thereto from the same. *Held*,

no error. The request involved a question of fact whether the persons drawn into the vicinity of plaintiff's premises were likely to become customers at the same, which fact further depended on the occupations, means, and places of home and business of the passers-by. The refusal of the judge to find upon this question of fact cannot be disturbed. *Bischoff v. N. Y. Elevated R. R. Co.*, 211.

2. The action was for an injunction and incidental damages against defendants' elevated railroad. The trial court failed to note its disposition of the proposed findings of fact and conclusions of law in the margin opposite each proposition as required by section 1023 of the Code of Civil Procedure, but endorsed upon the proposed findings and conclusions the following ruling: "Each of the within requests is to be marked 'Refused,' except so far as covered by the findings of fact and conclusions of law settled and signed by me." *Held*, that while this mode of passing upon defendants' propositions was not in strict compliance with the provisions of section 1023 of the Code of Civil Procedure, the court did indicate the manner in which each proposition had been disposed of and hence complied substantially with the statute. The question, however, is not properly presented by the record to the general term. The better practice would have been to apply to the court below to have the omission complained of supplied, or the mistake, if one, corrected, and, in case of refusal, to have made the application and refusal a part of the record. *Hunter v. Manhattan Ry. Co.*, 312.

#### FIRE DEPARTMENT.

See CERTIORARI.

## FRAUD.

1. There were no material misrepresentations made by defendants to induce the plaintiff to execute the bill of sale in this case. Plaintiff intended to give defendants security for their demands against him, and it was executed in the form of a bill of sale, when a chattel mortgage might have been more appropriate for the purpose intended. After the defendants received the bill of sale, they asserted their rights under it, sooner than the plaintiff expected, and plaintiff's store and stock in trade, etc., were sold to satisfy defendants' claims. This action was to set aside the bill of sale on the ground of fraud. *Held*, that the bill of sale was not procured by fraudulent representations as to material facts, and should not be set aside, and, therefore, the complaint was properly dismissed. Although the bill of sale was absolute on its face, it was clearly intended as security for the debt by way of mortgage and not as a satisfaction thereof, and if this action had been to declare it as a mere security for the sum due and for an accounting of the proceeds of sale, it would have been maintained; but this action is founded on fraud to avoid the instrument altogether and for damages, as if no writing whatever had been executed or intended to be executed. The plaintiff is not entitled on the evidence in the case to the broad relief claimed. *Schelling v. Bischoff*, 68.
2. The object of this action was to obtain a judgment of this court, to the effect, that certain pieces of real estate, the title to which, at the time of the death of Isaac L. Pinckney, stood in the name of his widow, Henrietta Pinckney, were equitably a part of the estate of Isaac L. Pinckney when he died. These pieces had been duly conveyed to Henrietta

Pinckney at the request of her husband, who paid the consideration for the same. The plaintiffs claimed that the conveyances in question created a trust in said Henrietta Pinckney to consider and treat and dispose of the same, as the property and estate of Isaac L. Pinckney, under his last will and testament, in which he appointed the said Henrietta as sole executrix. The plaintiffs also claimed that said Henrietta Pinckney had accepted such grants on her promise that she should hold the said real estate in trust and not as her own absolute property. The court held that no promise had been proved, and that if it had been so proved it would have been void, as also would have been the so-called and claimed trust. That if such an oral promise or oral trust had been established, it would not have been fraud on the part of the grantee to have refused to recognize the validity of either. The inference from the whole testimony in the case is, that Isaac L. Pinckney did intentionally what he did do, or cause to be done, in regard to the conveyances, intending and meaning that his action in the premises should have its full legal effect. *Watson v. Pinckney*, 188.

3. This action was brought to recover from defendant the sum of \$10,000, upon a policy of insurance upon the life of Charles H. Hyde, payable upon his death to the firm of Studwell, Sanger & Co., of which firm plaintiffs are the sole surviving partners. The application for insurance, and the statements therein, and the by-laws of respondent, by the terms of the policy were made a part of the contract of insurance between Hyde and the defendant. The defence was based upon alleged misrepresentations in the application for insurance or the suppression of facts therein which should have been stated.

In the application Mr. Hyde made this declaration: "That the foregoing application and this declaration, together with the answers and explanation given to the above various questions, and inclusive of those propounded by the medical examiner on the within pages hereof, shall form the exclusive and only basis of the agreement of the above-named applicant and the Mutual Benefit Life Association of America, and that *if any misrepresentations or fraudulent or untrue answers or statements have been made, or if any facts which should have been stated to the association have been suppressed therein, \* \* \** or should the applicant fail to comply with any of the terms of this agreement, or with any of the conditions and agreements contained in the certificate of membership, \* \* \* *then this agreement shall become null and void*, and all moneys which shall have been paid shall be forfeited to the said Association for its sole benefit." At the conclusion of the statement made to the medical examiner, Mr. Hyde further says: "I hereby further declare that I have read and understand all of the foregoing questions put to me by the medical examiner, and the answers thereto, and that the same are warranted by me to be true." In the application for insurance this question was asked of Mr. Hyde: "What amounts are now insured on your life, and in what companies? A. \$10,000 'Family Fund.'" The plaintiffs' proofs of death submitted to the defendant show that Mr. Hyde had \$10,000 insurance in the "Mutual Life Insurance Company of New York." Defendant's "Exhibits B, C, E and F" are conclusive evidence of the falsity of this statement. They show that on January 30, 1868, and several years prior to the application made to the defendant, Mr. Hyde

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*Demurrer to complaint in action in equity to vacate and set aside a judgment as being founded in fraud, etc.* See *Woodruff v. Johnston*, 348.

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*Contract of guaranty—Action to recover dividends at the rate of 7% per annum, on \$150,000 of the capital stock of the Philadelphia and New York Steam Navigation Company.* See *Lorillard v. Clyde*, 428.

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In an action for interpleader and injunction, *Held*, that the plaintiff is not entitled to an interpleader, and, therefore, no right to the injunction sought existed. and the motion for an injunction was properly denied. *German Savings Bank v. Friend*, 400.

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##### (LIFE.)

1. Plaintiff is the beneficiary named in a certificate of membership issued by plaintiff, by the terms of which \$1,000 became payable to plaintiff on the death of her sister. The decedent was admitted to membership December 26, 1888, and died March 24, 1890. In her application for membership she represented herself to be in good health and not suffering from cancer. There was a breach of the warranty contained in the application, as claimed by defendant, based upon the certificate of death that was furnished by Dr. Lewis, her attendant physician, on March 24, 1890, which stated that the chief cause of death was cancer of the uterus, and the duration of the disease two years, which would indicate that the decedent had been troubled with that disease prior to and at the time of her application and admission as a member of defendant's society. The main question in the case, is whether such certificate, unimpeached and uncontradicted, conclusively established the breach of warranty claimed by the defendant. *Held*, that the statement in the certificate must be taken rather as an expression of opinion of the physician, and, as such, in no sense conclusive evidence of the fact stated. There is nothing in the act of 1882 (§ 604) requiring

the physician to certify to the "duration of the disease," so that his opinion that the duration of the disease was two years was not called for by article 9, section 1, of the constitution and by-laws of the defendant, interpreted in the light of the statute; hence such opinion does not rise to the dignity of evidence *prima facie* or otherwise. Upon the submission to the jury of this question upon the evidence and the verdict, finding there was no misrepresentation by the decedent, and that she was not in ill health at the time she joined the order, the judgment and order appealed from must be affirmed. No error found in the case. *Muller v. Orden Germania*, 43.

2. This action was brought to recover from defendant the sum of \$10,000, upon a policy of insurance upon the life of Charles H. Hyde, payable upon his death to the firm of Studwell, Sanger & Co., of which firm plaintiffs are the sole surviving partners. The application for insurance, and the statements therein, and the by-laws of respondent, by the terms of the policy were made a part of the contract of insurance between Hyde and the defendant. The defence was based upon alleged misrepresentations in the application for insurance or the suppression of facts therein which should have been stated. In the application Mr. Hyde made this declaration: "That the foregoing application and this declaration, together with the answers and explanation given to the above various questions, and inclusive of those propounded by the medical examiner on the within pages hereof, shall form the exclusive and only basis of the agreement of the above-named applicant and the Mutual Benefit Life Association of America, and that *if any misrepresentations or fraudulent or untrue answers or statements*

*have been made, or if any facts which should have been stated to the association have been suppressed therein, \* \* \** or should the applicant fail to comply with any of the terms of this agreement, or with any of the conditions and agreements contained in the certificate of membership, \* \* \* *then this agreement shall become null and void*, and all moneys which shall have been paid shall be forfeited to the said Association for its sole benefit." At the conclusion of the statement made to the medical examiner, Mr. Hyde further says: "I hereby further declare that I have read and understand all of the foregoing questions put to me by the medical examiner, and the answers thereto, and that the same are warranted by me to be true." In the application for insurance this question was asked of Mr. Hyde: "What amounts are now insured on your life, and in what companies? A. \$10,000 'Family Fund.'" The plaintiffs' proofs of death submitted to the defendant show that Mr. Hyde had \$10,000 insurance in the "Mutual Life Insurance Company of New York." Defendant's "Exhibits B, C, E and F" are conclusive evidence of the falsity of this statement. They show that on January 30, 1868, and several years prior to the application made to the defendant, Mr. Hyde took out two policies of insurance in the "Mutual Life Insurance Company of New York" for \$5,000 each, and that the same were in full force right along up to the time Mr. Hyde died, and that the amounts insured by said policies were actually paid to Mr. George H. Studwell, one of the plaintiffs in this action, on the 24th day of January, 1890. These policies were offered and received in evidence, and the fact that, in addition to the insurance mentioned by Mr. Hyde in his application, he was

also insured at the time of that application for the sum of \$10,000 in the "Mutual Life Insurance Company of New York" is not disputed. The answer upon its face appeared to be complete, and it does not, therefore, come within the rule of those cases which hold that where an answer is manifestly incomplete upon its face, the insurers will be deemed to have waived the right to a more complete answer if they make no further inquiry in relation thereto. This answer was complete and full upon its face, and there was nothing in it which could have possibly required, induced or provoked further inquiry in relation to the subject matter of this particular question. At the conclusion of the evidence defendant moved to dismiss the complaint upon the ground, among others, that Mr. Hyde, in his answers made and contained in the application, suppressed the fact that he was insured in the Mutual Life Insurance Company for \$10,000, and the trial judge dismissed the complaint solely upon that ground. *Held, on appeal*, that the policy in suit and the application therefor constituted the contract for insurance between Charles H. Hyde and defendant. The evidence disclosed, and it incontestably appeared, that a material fact had been suppressed which should have been stated to the association under the contract, and there could be no other reasonable conclusion than that he knew of the existence of the policies from the Mutual Life Insurance Company and intentionally suppressed the fact. It would be unreasonable to call upon defendant, years after these policies had been issued and the facts that had transpired leading to their issue had occurred, to give positive and direct proof of the intentional omission on the part of the insured of a fact which by

the terms of the contract the insured had agreed to place in defendant's possession, and it follows that plaintiffs were not entitled to recover, and the dismissal of the complaint did not constitute error. *Studwell v. Mut. Benefit Life Ass'n*, 287.

#### (MARINE).

The principal question in this case related to the effect of a cancellation of the policy after the loss of the vessel and before either party had knowledge of the loss. The parties intended to and did cancel the policy, not from the time of its original execution and delivery, but on and after December 3, 1888, the day of its cancellation. The defendant retained the premium for the risk to that time, merely returning the unearned premiums for the unexpired time of the policy. *Held*, that the vessel having been lost prior to the cancellation, the liability of the defendant had become fixed and irrevocable at the time of the loss. The plaintiff did not intend to release, nor did the defendant expect to be released from any liability already incurred and existing, but only from any liability that might occur thereafter. *Duncan v. N. Y. Mut. Ins. Co.*, 13.

#### INTERPLEADER.

In an action for interpleader and injunction, *Held*, that the plaintiff is not entitled to an interpleader, and, therefore, no right to the injunction sought existed, and the motion for an injunction was properly denied. *German Savings Bank v. Friend*, 400.

#### JOCKEY CLUBS.

The contention of the plaintiff in this case was that the colt

"Huron" was sold "*with all his racing engagements*," among which was "The Futurity," and by means of such purchase of the colt, he became entitled to run the said colt in "The Futurity" race on August 29, 1891. At the time of the sale the colt was eligible as a competitor for "The Futurity." In the catalogue of sale the colt was described as "Eligible to Coney Island Futurity, 1891." Upon the verified complaint in the action the special term granted a mandatory injunction directing the defendant to permit a certain horse known as "Huron," the property of the plaintiff, to take part in a race called "The Futurity," on the 29th day of August, 1891. From the order granting the same this appeal is made. *Held*, that the sale of the colt as "Eligible to Coney Island Futurity, 1891" in the description of the colt "Huron," when read in with the conditions of the sale, did not operate as a declaration by the vendor that the colt was sold with his racing engagements, and that representation of eligibility, can hardly be held as one of the conditions of sale, and certainly it would be unreasonable to make the further claim that this description meant a sale of the colt, with all his engagements. If, however, under the facts and circumstances, it may be assumed that the plaintiff did purchase the colt "Huron" with his engagements, and succeeded to all the rights of General Jackson, the vendor, in respect to the colt and "The Futurity" race, and there was a question whether the plaintiff had or had not a right to run the said colt in the Futurity race of 1891, the executive committee of defendant, were the final arbiters, and that committee decided that the said colt was not eligible to star in "The Futurity race of 1891" and that decision

this court will not overturn. Executive committees of jockey clubs and social clubs, are supreme within themselves, when acting within the scope of their recognized legal authority, and the courts will not interfere with their decisions when rendered in accordance with their powers and rights. The statutes of this State give the defendant the right to conduct races at certain specified times, and the right to settle controversies, like the one in question, is just as firmly established, and it has the support of sound principles of equity, declared in a long line of authorities. The executive committee of the corporation-defendant were fully warranted in the decision reached and in the course pursued. *Corrigan v. Coney Island Jockey Club*, 398.

## JUDGMENT.

1. In an action for conversion tried by consent of parties by the court without a jury, *Held*, that complaint was properly dismissed, but at the dismissal was upon plaintiff's own showing, and without findings, it should not have been dismissed "*upon the merits*," the judgment should be modified by striking out the words "*upon the merits*." *Knight v. Sackett Wilhelms L. Co.*, 219.
2. In an application to vacate a judgment and suppress the deposition of a witness on the ground of newly-discovered evidence the motion was founded upon affidavits. The court below held that such a motion should be made upon a case and exceptions, as well as the affidavits, and therefore denied the motion with leave to renew upon such case. *Held*, that the court below correctly indicated the practice to be followed in such a case, and that the order was prop-

- erly granted. *Michel v. Colegrove*, 278.
3. This is an appeal from an order vacating the judgment as to defendant Smith upon the ground that no process had ever been served upon him, and that he never authorized any one to appear for him, etc. *Held*, that under all the circumstances and facts, and in view of the same as set forth in the opinion of the court, the court below was justified in vacating the judgment unconditionally. *Mayor v. Smith*, 874.
- Motion to vacate a judgment and to suppress the deposition of a witness taken by commission made upon a case and exceptions and affidavits. See Michel v. Colegrove*, 280.
- Jurisdiction of the Supreme Court of the District of Columbia, and the validity of its decrees, must be determined by the laws of the United States, and the construction and interpretation of the same by the Supreme Court of the United States. See Hovey v. Elliott*, 409.

#### JURISDICTION.

1. Relator was a member of the fire department of the city of New York. On charges preferred against him for assault on a superior officer, he was tried before the board of fire commissioners, found guilty and dismissed from the force. On the review on appeal, *Held*, that the respondents had jurisdiction to make the order. They complied with all the formalities required by the statute. The preponderance of evidence indicates that the relator was guilty of an act of insubordination and breach of discipline and "conduct injurious to the public peace and welfare," that sustains the conclusions of the commissioners as to his guilt, and for which, under

section 440 of the Consolidation Act he could be dismissed from the force. Section 2141, of the Code of Civil Procedure, authorizing the court, upon a hearing on return to a writ of certiorari, "to make a final order annulling or confirming wholly or partly, or modifying the determination reviewed," do not authorize the review or modification of the determination of inferior jurisdiction, in matters within their jurisdiction, which are confided to their discretion. *People ex rel. Burns v. Purroy*, 284.

2. The jurisdiction of the Supreme Court of the District of Columbia, and the validity of its decrees, must be determined by the laws of the United States, and the construction and interpretation of the same by the Supreme Court of the United States. *Hovey v. Elliott*, 409.
3. In this case the referee found that the decree in question was invalid for want of jurisdiction of the said Supreme Court of the District of Columbia to enter the same. *Held*, that the referee reached the right conclusion, and the judgment is affirmed upon the opinion of the referee relating to the question of jurisdiction of said court. *Ib.*
- Court of Appeals—Remittitur—Entry of judgment in regard to costs—Restitution under the Code, powers of the court below to order the same. See Genet v. Del. & H. Canal Co.*, 332.
- Vacation of judgment upon the ground that no process had ever been served upon the defendant Smith, and that he never authorized any one to appear for him, etc. See Mayor v. Smith*, 874.

#### LACHES.

See TRIAL, 13.

#### LANDLORD AND TENANT.

See LEASE.

## LEASE.

1. This action was brought to recover damages for an alleged breach of the usual clause or covenant in a lease which required the defendant (the lessee) to permit the notice "To Let" to be placed upon the building, and to allow the building to be inspected by persons desiring to rent the same from the plaintiff (the lessor). A sub-tenant of the defendant occupying the premises from March 1 to May 1, 1889, the last portion of the term, refused to permit the plaintiff to exhibit the premises or to put up the bill of "To Let" thereon, as provided for in the covenant. There was no evidence that the plaintiff could have rented the premises, beyond that to be inferred from the fact that defendant's sub-tenant refused to show the premises to a person taken there to inspect them and to permit the bill "To Let" to remain on the premises. After the termination of the lease the premises remained vacant for about five months. They were worth about \$75 per month, and the jury awarded the plaintiff \$375 damages, being the rent for the time the premises were vacant. *Held*, that there was no reasonable certainty that the plaintiff would have let the house if the covenant claimed to have been violated had been literally and fully performed. There was no solid substantial basis on which the jury could find, as matter of fact, that the refusal to perform this covenant was the sole cause of keeping plaintiff's house idle for five months, and in consequence plaintiff lost so many months' rent. The result arrived at was necessarily speculative and conjectural. The jury were limited to an award for damages or compensation for the *actual*, not the *possible* loss, and from the evidence there is no way of determining that the sum awarded was necessary to compensate for the real injury done, or that the acts of the under-tenant were the proximate cause of so much damage. There was nothing in the proofs presented on the trial of this action to warrant the damages allowed to the plaintiff and awarded by the verdict of the jury. *U. S. Trust Co. v. O'Brien*, 1.
2. Upon the trial of the issues the trial judge, after hearing part of the testimony offered by the plaintiffs, refused to hear the remainder, and dismissed the complaint upon the ground that the lease did not give the exclusive use of the entrance and hallway to the stairway leading to the premises leased to the plaintiffs, and did not prohibit the cutting and use of a door by the defendant, from the hallway into the saloon. This ruling was erroneous, as it was based upon the theory or conclusion of the judge that the lease itself constituted the whole contract between the parties, and that inasmuch as the lease did not in terms grant to plaintiffs the exclusive use and control of said hallway, evidence of a prior or contemporaneous oral agreement concerning said hallway was inadmissible, and so far as such evidence had been permitted to be given it must be disregarded. *Lynch v. Hunneke*, 235.
3. The general rule which excludes conversations, negotiations and parol agreements, prior to the execution of a written agreement relating to and springing out of such conversations, negotiations, etc., does not apply to this case. (1) When the original contract, although verbal, yet was entire, and only a part of it was reduced to writing, then all the part not so reduced can be proved by parol. (2) When the consideration, or a consideration further than that expressed in the writ-

ing, does not appear in the writing, the consideration or the further consideration may be proved by parol. Parol evidence is always admissible as to the meaning which the parties themselves attached to a particular word or phrase in the contract. Such evidence does not contradict or vary the terms of the written contract, but is simply explanatory thereof. *Ib.*

1. The lease in question was for six lofts above the first floor, "*together with the appurtenances.*" These words gave to the plaintiffs whatever was attached to or used with the premises as incident thereto, and convenient or essential to the beneficial use and enjoyment thereof, and the plaintiffs took thereby any easement or servitude used or enjoyed with the leased premises; and, as the appurtenances were not specified, parol evidence was admissible to show that the parties, preparatory to the execution of the lease, met and discussed their character and extent, and agreed that the appurtenances should include all that they appeared to include, and that the defendant would not make a change in such appearances in derogation of his grant; and that in strict reliance upon the promise of the defendant, not to change the appurtenances as they then existed and were understood, the plaintiffs executed the lease. *Ib.*

5. Parol evidence to this effect was partly given and partly offered to be given, but rejected. The plaintiffs did show that before the lease was executed the defendant proposed that, by express terms in the lease, he should reserve the right of cutting a door from the hall into the saloon, to which plaintiffs strenuously objected, and defendant expressly waived the point in plaintiffs' favor. It must be assumed in this case that if the

plaintiffs had been permitted to give in all the evidence competent under the issues, within the rules stated, they would have made out a *prima facie* case entitling them, in the absence of evidence to the contrary, to relief against the injurious use of the hall leading to their premises, or of the side door that was cut from said hall into the saloon. For the reasons stated the dismissal of the complaint constituted error. *Ib.*

*Elevated railroad—Recovery of rental damage during remaining period of lease outstanding at date of plaintiff's purchase.* See *Bischoff v. N. Y. Elevated R. R. Co.*, 211.

*Damages by elevated railroad—Evidence as to rents of neighboring properties by entries in books of deceased owner—Written leases executed and recorded as evidence of rents, when competent.* See *Greenwood v. Met. El. Ry. Co.*, 258.

## LIBEL.

*Held*, that aside from *ex parte* petitions and the like, any publication made in the ordinary course of judicial proceedings is privileged if the article be a fair and impartial account thereof. Although the publication may be to the disadvantage of the particular suitor, the paramount advantage to the public fully justifies the end attained. The truth irrespective of motives is a complete justification to a civil action for libel. Every one has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. Such comments are not libelous, however severe in their terms, unless they are written maliciously. Report and comment are two separate and distinct things. A report is the mechanical reproduction of

what actually took place. Comment is the judgment passed upon the circumstances reported by one who has considered the same. Fair reports are privileged, while fair comments are no libels at all. Blending the report and comments together does not make the matter libelous if it would not be so if the one was separated from the other. The report in this case is within the protection of privileged publications and the comments are justified by the facts disclosed. The plaintiff could only recover upon affirmative proof of malice, and there is an entire absence of that essential element in the case. *Johns v. Press Publishing Co.*, 207.

## MALICE.

SEE LIBEL.

## MASTER AND SERVANT.

1. This action was to recover the salary of James R. Wardlaw, as assistant engineer, during the interim between the time of his suspension and his final discharge. The defence was that Wardlaw was appointed city surveyor, and his attempt to hold the position of assistant engineer was holding two offices which, under section 55 of the Consolidation Act, prevents a recovery. *Held*, that defendant might have discharged decedent and relieved itself from all liability, but it could not suspend him without pay. The appointment of city surveyor is not an office within the meaning of section 55 of the Consolidation Act. Office, in the sense there employed, embraces the idea of public station, tenure, emolument and duties, involving the right and duty to execute some public trust. The position of city surveyor has no tenure or

salary ; does not exist independently of the incumbent, and does not become vacant by his death, removal or resignation. *Wardlaw v. the Mayor*, 174.

2. Relator was a member of the fire department of the city of New York. On charges preferred against him for assault on a superior officer, he was tried before the board of fire commissioners, found guilty and dismissed from the force. On the review on appeal, *Held*, that the respondents had jurisdiction to make the order. They complied with all the formalities required by the statute. The preponderance of evidence indicates that the relator was guilty of an act of insubordination and breach of discipline and "*conduct injurious to the public peace and welfare*," that sustains the conclusions of the commissioners as to his guilt, and for which, under section 440 of the Consolidation Act, he could be dismissed from the force. Section 2141, of the Code of Civil Procedure, authorizing the court, upon a hearing on return to a writ of certiorari, "*to make a final order annulling or confirming wholly or partly, or modifying the determination reviewed*" do not authorize the review or modification of the determination of inferior jurisdiction, in matters within their jurisdiction, *which are confided to their discretion*. *People ex rel. Burns v. Purroy*, 284.
8. On or about August 25, 1888, the defendant, as contractor and builder, was erecting and constructing a house on premises in West 83d street, New York City, and plaintiff's intestate, Charles Flynn, was employed as a day-laborer on this building. His service at the time of the accident was the removal of brick and mortar, contained in hods, from an elevator machine which carried the materials from the ground to the several floors

above, and he was engaged on the 4th floor in taking the hods from the elevator and dumping the contents upon a scaffold near the elevator, for use in building the front wall of said house ; and while the intestate was so employed the floor-beams gave away and precipitated the materials that had been deposited near the elevator upon the floor beneath, and carried it and all the other floors below, with their contents, down to the cellar. The deceased intestate fell with the floors and was thereby killed. This action was brought to recover damages for the death of plaintiff's intestate, on the ground of the defendant's negligence and want of care and skill in the construction of said building, and in negligently and carelessly overloading the beams and girders of said building with brick and mortar and other building materials. When the plaintiff rested her case, the court below dismissed the complaint on the ground that there was no evidence of any negligence on the part of the defendant, but that whatever negligence there was in the premises attached to the plaintiff's intestate and his fellow-workmen. *Held*, that the complaint having been dismissed on defendant's motion after the close of plaintiff's case, without any testimony whatever on the part of defendant, all the evidence contained in the record must be taken as true for the purposes of this appeal, and appellant is entitled to have every doubtful fact found in her favor ; also, that the only inference that can be drawn from the evidence, as to the cause of the accident, is that it was occasioned by overloading the fourth story with brick and mortar, which were brought up from the ground and placed upon the floor of the fourth story, under orders from the defendant, or from his fore-

man and agent with the knowledge of defendant ; that the quantity of the material that could be safely placed upon the fourth and other floors was not a question for decision in the discretion of the laborers, of whom the intestate was one, and, therefore, the overloading of the floor was not an error of judgment on the part of said laborers, who were charged simply with the duty of taking from the elevator the materials sent up by direction of the defendant or his foreman. The defendant and his foreman must be presumed to have known the quantity of brick and mortar that could be safely placed upon the fourth floor. The evidence did not justify the conclusion of the trial judge. It was not due or owing to the want of judgment on the part of the laborers, of whom the intestate was one. The intestate was free from contributory negligence, for he and his fellow-workmen were obeying the orders of defendant, or his agent, and defendant was present and saw the work going on. The intestate was merely carrying out the orders of defendant, who must be presumed to have had a fair and reasonable knowledge of the business in which he was engaged, which includes a knowledge of at least the approximate strength of the floor timbers he had placed in the building, and a knowledge of the approximate weight of twelve or thirteen thousand bricks and the mortar he had accumulated upon that floor. It was the duty of the trial judge to have submitted the case to the jury. *Flynn v. Harlow*, 293.

4. The trial judge held in this case, that the plaintiff's intestate was guilty of contributory negligence in doing the work that he, as the apprentice of defendant, was called upon to do in his master's business ; also that the payment

of \$400 by defendant to Oscar Krause, one of the plaintiffs, might be considered a bar to the action. *Stuber v. McEntee*, 338.

5. The plaintiff's intestate, being in the employ of defendant, as a car-inspector, was between two cars, inspecting the coupling thereof. The cars were standing detached from an engine. While engaged in this work, an engine, with freight cars attached, backed upon the track upon which these two cars stood and caused a collision whereby the plaintiff's intestate was killed. The negligence complained of was, that it being the duty of defendant to have flag-men or signal-men upon the freight cars attached to the engine and in motion, in order to signal to the operator of the engine of any obstruction being approached by the backing train; that the defendant failed to provide such flag-men or signal-men whereby the collision occurred and plaintiff's intestate was killed. The defendant denied negligence on its part, alleged contributory negligence, and if there was any other it was the negligence of a fellow-servant or fellow-servants in the common employment of defendant with deceased. The jury found a verdict for plaintiff for \$5,000. Judgment affirmed on the opinion of the court below. *Potter v. N. Y. C. & H. R. R. Co.*, 351.

#### MAXIMS.

*Certum est quod certum reddi potest*, 27.

*De minimis non curat lex*, 103.

*Expressio unius exclusio alterius*, 49.

*Sic utere tuo ut alienum non lædas*, 165.

#### NEGLIGENCE.

1. The plaintiff was a passenger on

one of defendant's cars going up-town. At a point on First avenue, between 65th and 66th streets, the track was blocked by a broken-down van or truck, and the passengers, including the plaintiff, at the request of the conductor, engaged in the work of moving the car from the track and around the obstruction, that it might continue its journey. While thus engaged another car of defendant's, coming down the avenue, met with the same obstruction, and its conductor and driver proceeded to jump the car around on the east side of the track, and the same side upon which the plaintiff was engaged with the conductor, and thereby the plaintiff was caught between the cars and injured. If the car going down had been jumped to the west, as it should have been, the accident would have been avoided. *Held*, that the plaintiff was lawfully on the street at the time, by request of the conductor of the up-town car, and had no warning of the danger, and cannot be said to have contributed to the collision or to the bringing on of the injury to himself, and it was for the jury to determine the question of negligence of the defendant in the premises. The motion of defendant's counsel to dismiss the complaint was properly denied, and the verdict of the jury was sustained by the evidence. *Stastney v. Second Ave. R. R. Co.*, 104.

2. In this case the controlling question before the court and jury was whether the accident was caused by the negligence of Burke, the driver of the carriage in which plaintiff was riding, or the negligence of the railroad company. The negligence of the driver could not be imputed to the plaintiff. From the facts in evidence in the case the jury might have found that the driver and the railroad company were both negligent, but

the question of their joint negligence was not sent to or placed before the jury, and the plaintiff did not have the benefit of the finding of the jury whether each was partly negligent, and, therefore, both jointly negligent, and for this reason a new trial was ordered. *Collins v. Long Island R. R. Co.*, 154.

3. On or about August 25, 1888, the defendant, as contractor and builder, was erecting and constructing a house on premises in West 83d street, New York City, and plaintiff's intestate, Charles Flynn, was employed as a day-laborer on this building. His service at the time of the accident was the removal of brick and mortar, contained in hods, from an elevator machine which carried the materials from the ground to the several floors above, and he was engaged on the 4th floor in taking the hods from the elevator and dumping the contents upon a scaffold near the elevator, for use in building the front wall of said house; and while the intestate was so employed the floor-beams gave way and precipitated the materials that had been deposited near the elevator upon the floor beneath, and carried it and all the other floors below, with their contents, down to the cellar. The deceased intestate fell with the floors and was thereby killed. This action was brought to recover damages for the death of plaintiff's intestate, on the ground of the defendant's negligence and want of care and skill in the construction of said building, and in negligently and carelessly overloading the beams and girders of said building with brick and mortar and other building materials. When the plaintiff rested her case, the court below dismissed the complaint on the ground that there was no evidence of any negligence on the part of the defendant, but that

whatever negligence there was in the premises attached to the plaintiff's intestate and his fellow-workmen. *Held*, that the complaint having been dismissed on defendant's motion after the close of plaintiff's case, without any testimony whatever on the part of defendant, all the evidence contained in the record must be taken as true for the purposes of this appeal, and appellant is entitled to have every doubtful fact found in her favor; also, that the only inference that can be drawn from the evidence, as to the cause of the accident, is that it was occasioned by overloading the fourth story with brick and mortar, which were brought up from the ground and placed upon the floor of the fourth story, under orders from the defendant, or from his foreman and agent with the knowledge of defendant; that the quantity of the material that could be safely placed upon the fourth and other floors was not a question for decision in the discretion of the laborers, of whom the intestate was one, and, therefore, the overloading of the floor was not an error of judgment on the part of said laborers, who were charged simply with the duty of taking from the elevator the materials sent up by direction of the defendant or his foreman. The defendant and his foreman must be presumed to have known the quantity of brick and mortar that could be safely placed upon the fourth floor. The evidence did not justify the conclusion of the trial judge. It was not due or owing to the want of judgment on the part of the laborers, of whom the intestate was one. The intestate was free from contributory negligence, for he and his fellow-workmen were obeying the orders of defendant, or his agent, and defendant was present and saw the work going on. The in-

testate was merely carrying out the orders of defendant, who must be presumed to have had a fair and reasonable knowledge of the business in which he was engaged, which includes a knowledge of at least the approximate strength of the floor timbers he had placed in the building, and a knowledge of the approximate weight of twelve or thirteen thousand bricks and the mortar he had accumulated upon that floor. It was the duty of the trial judge to have submitted the case to the jury. *Flynn v. Harlow*, 298.

4. The trial judge held in this case, that the plaintiff's intestate was guilty of contributory negligence in doing the work that he, as the apprentice of defendant, was called upon to do in his master's business; also that the payment of \$400 by defendant to Oscar Krause, one the plaintiffs, might be considered a bar to the action. *Stuber v. McEntee*, 388.

5. The plaintiff's intestate, being in the employ of defendant, as a car-inspector, was between two cars, inspecting the coupling thereof. The cars were standing detached from an engine. While engaged in this work, an engine, with freight cars attached, backed upon the track upon which these two cars stood and caused a collision whereby the plaintiff's intestate was killed. The negligence complained of was, that it being the duty of defendant to have flag-men or signal-men upon the freight cars attached to the engine and in motion, in order to signal to the operator of the engine of any obstruction being approached by the backing train; that the defendant failed to provide such flag-men or signal-men whereby the collision occurred and plaintiff's intestate was killed. The defendant denied negligence on its part, alleged contributory negligence, and if there was any other it was the negligence of a fellow-

servant or fellow-servants in the common employment of defendant with deceased. The jury found a verdict for plaintiff for \$5,000. Judgment affirmed on the opinion of the court below. *Potter v. N. Y. C. & H. R. R. Co.*, 351.

6. The order appealed from was an order of the special term, denying a motion made by defendant to vacate an order previously made, requiring defendant to submit to an examination as a witness before the trial on the part of the plaintiff, and the question, and facts before the court in the original proceeding are now considered on this appeal. *Held*, that the order must be affirmed, except that the examination should be limited to the defendant's ownership of the elevator and his relations to the persons who had it in charge at the time of the injury, and the disclosure of the name and address of the physician called by the defendant to attend the plaintiff. The right to such an examination, under the provisions of the Code, is subject to the power of the court to confine the scope of the examination to the legal necessities of the party who seeks it. *Douglass v. Mayor*, 369.

*Action for negligence—Examination of plaintiff before trial. Order for same should restrict examination to questions as to the time when and the place where the alleged accident occurred and as to residence of plaintiff at the time of the accident, See Kinsella v. Second Ave. R. R. Co.* 484.

*Evidence—Negligence. Proof of subsequent admissions by witness, the servant of defendants, denied on cross-examination, and inconsistent with direct testimony, when competent. In an action for personal injuries caused by the alleged negligent management of defendants' truck whereby plaintiff was run*

over at 108th street and 4th avenue, the driver testified in behalf of defendants that no unusual accident was brought to his attention except when he was arrested. He was arrested at 125th street and denied, on cross-examination and over objection by defendants, having asked the police officer "Is this the 108th street racket?" Held, that the testimony of the police officer in rebuttal that the driver asked said question was competent. See *Barrett v. Smith*, 458.

#### NEW TRIAL.

See TRIAL, 1, 8, 14.

#### NEW YORK CITY.

This action was to recover the salary of James R. Wardlaw, as assistant engineer, during the interim between the time of his suspension and his final discharge. The defence was that Wardlaw was appointed city surveyor, and his attempt to hold the position of assistant engineer was holding two offices which, under section 55 of the Consolidation Act, prevents a recovery. Held, that defendant might have discharged decedent and relieved itself from all liability, but it could not suspend him without pay. The appointment of city surveyor is not an office within the meaning of section 55 of the Consolidation Act. Office, in the sense there employed, embraces the idea of public station, tenure, emolument and duties, involving the right and duty to execute some public trust. The position of city surveyor has no tenure or salary; does not exist independently of the incumbent, and does not become vacant by his death, removal or resignation. *Wardlaw v. The Mayor*, 174.

*Certiorari*, writ of, reviewing the proceedings of fire department on trial of relator. See *People ex rel. Burns v. Purroy*, 284.

*Certiorari* to review proceedings of police commissioners. Where the writ directs the commission to certify all the acts and proceedings sought to be reviewed, it will be presumed from the absence of the statement in the return that it contains all of such acts and proceedings, and from the fact that the judgment of the commissioners in the case is not referred to in the return, that all the acts of the Board have not been returned, and a further return containing such statement with other proper matter should be directed. See *People ex rel. Minchen v. MacLean*, 458.

#### NOTICE OF APPEAL.

See APPEAL, 4.

#### OBJECTIONS AND EXCEPTIONS.

See TRIAL, 2.

#### PARTIES.

The objection that the plaintiff could not maintain the action is untenable. If the defendant intended to raise the objection that the plaintiffs were not the real parties in interest, it should have been pleaded in defence. *Coffin v. Grand Rapids Tr. Co.*, 51.

#### PARTNERSHIP.

1. The defendant Whitney made the \$4,000 note in suit, May 1, 1889, payable to his own order, thirteen months from its date, and indorsed the note, first by his individual name and next by

that of Fitch & Whitney, a firm of which he was a member, and delivered the same to one Hills in consideration of moneys loaned by Hills to Whitney long before the firm of Fitch & Whitney was formed. The plaintiff received the note from Hills before maturity and gave him (Hills) credit for the amount of the same on an account due to plaintiff from Hills. *Held*, that the plaintiff having parted with nothing on the faith of the paper, he did not become a *bona fide* holder thereof for value under the rules established in this state. The plaintiff simply succeeded to the rights of Hills, subject to all the equities existing between him and the defendants. Hills could not have maintained an action on this note against Fitch, because he knew the note and its endorsement had no connection nor business relation whatever with the firm of Fitch & Whitney, or its firm business. It was exclusively and absolutely the private transaction and personal contract of Whitney, and the plaintiff stands in no better position than Hills stood. Each partner is the agent of the partnership in, and as to all matters within the scope of the partnership business, and can bind the firm by making, endorsing and accepting bills and notes in relation to such business; but a partner has no more authority than a mere stranger to execute such paper in his individual business or for the accommodation of others; but as every partner has *prima facie* equal power to execute paper, a note signed by the firm name, although made by a single partner, is presumably a firm note; but when it appears, as in this case, that the note was not indorsed in the course of partnership business, but for the benefit of Whitney, and this fact was known to Hills, then it was incumbent on Hills' transferee to show that Fitch as

well as Whitney assented to the endorsement, that Fitch was a party to the contract. His assent must be proved and will not be implied or presumed. The exception to this rule exists only in favor of a *bona fide* holder for value without notice, for the giving of a note in partnership name by a partner is a virtual representation that it is given in the partnership business, and, if negotiable, this representation is deemed in law to have been made to every *bona fide* holder of the note, and the firm is estopped from denying the authority of the partner to execute and issue the instrument. The admissions made by one of a number of persons sought to be charged as partners, cannot be used against the others. Nothing short of the separate admissions of each is competent to establish a partnership between them. *Lyon v. Fitch*, 74.

2. In this case, after the appointment of a receiver of the co-partnership property, the appellant being a judgment creditor, applied to the court at special term in the original action for an order that the receiver pay out of the funds in his hands the amount of the judgment. The court below denied the petition, and from such denial this appeal was taken. *Held*, that the application was properly denied. In a case like this the court should consider and determine whether the applicant had a right to a preference over other creditors of the co-partnership. If it appeared that the estate was certainly solvent, leave might be granted, but if insolvent, and there was nothing in the claim that should give priority or preference, the application should be denied. In this case there was no reason why the appellant should not share equally with the other creditors. *Hoerle v. McIlhargy*, 184.

## PENAL CODE.

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## PLEADING.

1. *Held*, that the transaction between the plaintiff and defendant was practically a sale of goods by the former to the latter on its credit at twenty per cent. less than trade prices, deliverable in such manner as defendant directed. The defendant insists that, under the circumstances, the plaintiff should have declared on this special agreement and cannot recover on a general count for goods sold and delivered. The Code has not changed the former rule of pleading, that a party, who has fully performed a special contract may rely upon the implied assumpsit of the other party to pay him the stipulated price, and he is not bound to declare specially upon the special agreement. Under this rule the complaint was sufficient. *Swan Lamp Mfg. Co. v. Brush-Swan El. Light Co.*, 11.
2. This action was in equity to set aside the cancellation of a policy of marine insurance and recover for the loss of a vessel which occurred without the knowledge of the parties and prior to the loss. *Held*, that plaintiff required no equitable relief, assuming that the cancellation operated as to future liability only, but the plaintiff assumed that equitable relief was necessary to reinstate the parties to their position prior to the cancellation, but the defendant not having raised the objection in answer that equitable relief was unnecessary, cannot raise it now, and, therefore, it may be assumed that the plaintiff was properly in equity in his action, and that branch of the court obtained complete jurisdiction in the controversy. *Duncan v. N. Y. Mut. Ins. Co.*, 13.

3. The objection that the plaintiff could not maintain the action is untenable. If the defendant intended to raise the objection that the plaintiffs were not the real parties in interest, it should have been pleaded in defence. *Coffin v. Grand Rapids Tr. Co.*, 51.
  4. The allegation of the complaint was to the effect that defendant had said of the plaintiff that he had robbed him of four hundred dollars. At the close of the plaintiff's case the evidence did not warrant more than an inference that defendant had said that the plaintiff had robbed him of twelve hundred dollars. Leave to amend the complaint so as to conform the same to the proof was denied, and the complaint was dismissed because of variance. *Held*, to be error, as a variance between an allegation in a pleading and the proofs is not material unless it has actually misled the adverse party to his prejudice. *Miller v. Holmes*, 245.
  5. To the complaint in this action a demurrer was interposed setting forth various grounds. The court below considered only the fourth ground of demurrer—namely, that the complaint does not state facts sufficient to constitute a cause of action; and sustained the demurrer. *Held*, that the judgment should be affirmed. *Woodruff v. Johnston*, 348.
- Contract, defence thereto; defendant must elect either to stand upon her alleged counter-claim and affirm the contract, or to abandon the counter-claim and stand upon the alleged facts. See Societa Italiana, etc., v. Sulzer*, 326.
- Trial before referee—Effect of order of reference entered before service of amended answer and notice of trial—Waiver of objection by going on with trial instead of moving to vacate proceedings. See Degener v. Underwood*, 451.
- Amended answer, terms on which*

leave to serve same should be granted. Where a demurrer was sustained to a portion of the answer with leave to amend upon payment of costs within a time specified, defendant paid costs but neglected for nearly a year to serve such amended answer, and when the cause was about to be reached for trial moved to be relieved from his default and to be allowed to serve such amended answer, which motion was granted on payment of twenty dollars additional costs. Held, that the order should also have imposed as a condition the payment of the accrued term fees, and order modified accordingly. See *Haggerty v. Phelan*, 458.

#### POLICE COMMISSIONERS.

See CERTIORARI.

#### PRACTICE.

*Referee's fees under the Code, when changed by the consent of parties, etc.* See *Griggs v. Day*, 25.

*Stay of proceedings in this action until the trial and determination of another action pending in Supreme Court.* See *Dolbeer v. Stout*, 172.

*Trial—Effect of a request by both sides for direction of verdict by the judge upon the testimony.* See *Burrows v. Atlas S. S. Co.*, 206.

*Practice—Notice of appeal from an order must state the substance of the order correctly.* See *Ranow v. Hazard*, 217.

*Judgment, motion to vacate, and to suppress the deposition of a witness improperly obtained.* See *Michel v. Colegrove*, 278.

*Motion to vacate a judgment and to suppress the deposition of a witness taken by commission made upon a case and exceptions and affidavits.* See *Michel v. Colegrove*, 280.

*Certiorari, writ of, reviewing the proceedings of fire department on trial of relator.* See *People ex rel. Burns v. Purroy*, 284.

*Practice—Making requests to find pursuant to section 1028 of the Code of Civil Procedure—When general endorsement at foot of findings sufficient.* See *Hunter v. Manhattan Ry. Co.*, 312.

*Court of Appeals—Remittitur—Entry of judgment in regard to costs—Restitution under the Code, powers of the court below to order the same.* See *Genet v. Del. & H. Canal Co.*, 332.

*Order of attachment in an action to recover damages for injury to personal property.* See *Roome v. Jennings*, 361.

*Order for the examination of defendant as a witness before trial on the part of plaintiff, under sections 870, 871, and 872 of the Code.* See *Douglass v. Meyer*, 369.

*Vacation of judgment upon the ground that no process had ever been served upon the defendant Smith, and that he never authorized any one to appear for him, etc.* See *Mayor v. Smith*, 374.

*Order of arrest, exceptions to the sufficiency of bail and proceedings thereon.* See *Hetsch v. Bishop*, 441.

*Trial before referee—Effect of order of reference entered before service of amended answer and notice of trial—Waiver of objection by going on with trial instead of moving to vacate proceedings.* See *Degener v. Underwood*, 451.

*Amended answer, terms on which leave to serve same should be granted. Where a demurrer was sustained to a portion of the answer with leave to amend upon payment of costs within a time specified, defendant paid costs but neglected for nearly a year to serve such amended answer, and when the cause was about to be reached for trial moved to be relieved from his default and to be allowed to serve such amended*

answer, which motion was granted on payment of twenty dollars additional costs. Held, that the order should also have imposed as a condition, the payment of the accrued term fees, and order modified accordingly. See *Hagerty v. Phelan*, 453.

Action for negligence—Examination of plaintiff before trial. Order for same should restrict examination to questions as to the time when and the place where the alleged accident occurred and as to residence of plaintiff at the time of the accident. See *Kinsella v. Second Ave. R. R. Co.*, 454.

#### PRINCIPAL AND AGENT.

See AGENCY.

#### PRIVILEGED COMMUNICATION.

See LIBEL.

#### REAL PROPERTY.

1. In an action to secure relief by way of injunction and incidental rental damages against the defendants' elevated railway in First avenue in the city of New York it was shown that plaintiff was the owner of premises situated on the southeast corner of First avenue and Eighth street; that the station and platform of the defendants' elevated railway at First avenue and Eighth street was immediately in front of said premises, and that said station and the columns supporting it projected about two feet beyond the easterly house line of First avenue into Eighth street. The trial court directed the entry of a judgment enjoining the further maintenance and operation of defendants' railway and station in front of said premises, award-

ing a certain sum as damages for past trespasses and providing that the injunction should not be operative as to the structure and portion of the station in First avenue in case defendants, within a time specified, paid to plaintiff the sum of \$5,000, adjudged to be the value of easements taken, but directing defendants within a certain time to take down and remove such portion of said station as projected into Eighth street beyond the easterly house line of First avenue. Held, that the defendants can exercise only such power as the Legislature has given them; that when the route is designated the defendants must keep the whole and every part of their structure, of whatsoever nature the same may be, within the confines of the line. The onus was upon the defendants to show some grant which permitted them to diverge from the line of their route into Eighth street and erect a station projecting two feet beyond the easterly line of First avenue. No such permission was shown, and that portion of the structure must, therefore, be assumed to have been built and maintained without the semblance of right (not as a temporary privilege but permanent erection), and the court below properly directed its removal. *Adler v. Met. El. Ry. Co.*, 85.

2. The maxim *De minimis non curat lex* is never applied to the positive and wrongful invasion of another's property. The degree is wholly immaterial. Two feet of land in a thickly populated portion of a city is not so trifling as to deny the injured party the legal remedies necessary or proper for asserting the right of property thereto or to redress any trespass thereon. *Ib.*

8. The Taylor company, under a lease from the appellant Miller, uses the premises on the southeast corner of Madison avenue

and Forty-third street, adjoining the residence of respondent, for the sale of caskets and goods for funerals; also for embalming bodies, for autopsies and post-mortem examinations, and for the reception of human remains awaiting funeral rites and burial. The question is whether the business described is injurious or offensive within the meaning of the covenant. *Held*, that anything that is hurtful or noxious, that disturbs happiness, impairs rights, or prevents the enjoyment of them, is injurious; and if it causes displeasure, gives pain or unpleasant sensations, is offensive. The disturbing cause must be real not fanciful, must be more than mere delicacy or fastidiousness, but it need not necessarily be apparent to the sense of sight, smell or hearing, for it may be injurious without offending either. The plaintiff is not required to prove that defendant is maintaining a nuisance. She is seeking to enforce a covenant restricting the use of the adjoining property, and all she is required to prove is, that the use complained of is repugnant to the letter and spirit of the covenant. The mere fact that in this case there has been a breach of the covenant, by which each party is bound, is sufficient for the interference of the court by an order of injunction. The uses of such an establishment as the defendant, no matter how well conducted, is a source of injury to adjoining property, and is, to the fullest extent, "injurious" as well as "offensive to neighboring inhabitants" within the meaning of that term as used in the covenant sought to be enforced. The judgment of the special term sustained. *Rowland v. Miller*, 163.

*Deed of real estate to one party at the direction of another who pays the consideration—Trusts, express or implied—Under influ-*

*ence over the execution of a will or a conveyance. See Watson v. Pinckney*, 188.

#### RECEIVER.

In this case, after the appointment of a receiver of the co-partnership property, the appellant being a judgment creditor, applied to the court at special term in the original action for an order that the receiver pay out of the funds in his hands the amount of the judgment. The court below denied the petition, and from such denial this appeal was taken. *Held*, that the application was properly denied. In a case like this the court should consider and determine whether the applicant had a right to a preference over other creditors of the co-partnership. If it appeared that the estate was certainly solvent, leave might be granted, but if insolvent, and there was nothing in the claim that should give priority or preference, the application should be denied. In this case there was no reason why the appellant should not share equally with the other creditors. *Hoerle v. McIlhargy*, 184.

#### REFEREE.

1. The stipulation of the parties in writing provided "That the referee shall not be limited to the statutory fee of six dollars per day for his services in this case, but may charge such fees therefor as he deems proper." The referee's charges in the case were objected to on taxation, on the ground that the stipulation failed to specify any *specific* rate of compensation, and, therefore, was not "a different rate of compensation fixed by consent of the parties," as provided by the Code. The clerk, as taxing officer, sustained the objection,

and the special term judge, on appeal, sustained the clerk's ruling. *Held*, that this decision must be affirmed, under the construction of the Court of Appeals in *First National Bank v. Tamajo*, 77 N. Y., 476, and *Mark v. City of Buffalo*, 87 N. Y., 184, although the court in its opinion in this case considers the decision and construction of the Supreme Court in *Burt v. Oneida Community*, 59 Hun, 234, to be preferable for reasons cited in the opinion of the court, which fully sets forth the facts and points in this case. *Griggs v. Day*, 25.

2. In this case the conflict between the witnesses of the respective parties was quite marked and the result depended upon the credibility of the witnesses in the judgment of the referee. Upon the case as presented on this appeal the court would not be justified in interfering with the decision of the referee on the ground that his findings were against the weight of evidence. Nor is there any merit in the claim that some of the facts found by the referee are not supported by the evidence. The facts being so found from the evidence, they support the conclusion of law based thereon, in conformity with which the judgment was entered. *Seggermann v. Hillis Plantation Coffee Co.*, 233.

#### REFERENCE.

After the issues herein were referred to a referee, the defendants served an amended answer to which plaintiff served a reply. No notice of trial was served after issue joined on the amended answer. The defendants objected to proceeding before the referee at the opening of the trial, on the ground that the issues to be tried were not made until a date subsequent to the order of reference.

The referee proceeded with the trial and rendered a report in the plaintiff's favor. *Held*, that defendants were debarred from raising this question by their own laches in not seeking relief by motion to vacate the order of reference and proceedings held before the referee, prior to the presentation of their defence. *Degener v. Underwood*, 451.

#### REFORMATION.

See FRAUD, 1.

#### REMITTITUR.

See APPEAL, 8.

#### REVISED STATUTES AND SESSION LAWS.

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#### SALES.

1. *Held*, that the transaction between the plaintiff and defendant was practically a sale of goods by the former to the latter on its credit at twenty per cent. less than trade prices, deliverable in such manner as defendant directed. The defendant insists that, under the circumstances, the plaintiff should have declared on this special agreement and cannot recover on a general count for goods sold and delivered. The Code has not changed the former rule of pleading, that a party who has fully performed a special contract may rely upon the implied assumpsit of the

other party to pay him the stipulated price, and he is not bound to declare specially upon the special agreement. Under this rule the complaint was sufficient. *Swan Lamp Mfg. Co., v. Brush-Swan El. Light Co.* 11.

2. There were no material misrepresentations made by defendants to induce the plaintiff to execute the bill of sale in this case. Plaintiff intended to give defendants security for their demands against him, and it was executed in the form of a bill of sale, when a chattel mortgage might have been more appropriate for the purpose intended. After the defendants received the bill of sale, they asserted their rights under it, sooner than the plaintiff expected, and plaintiff's store and stock in trade, etc., were sold to satisfy defendants' claims. This action was to set aside the bill of sale on the ground of fraud. *Held*, that the bill of sale was not procured by fraudulent representations as to material facts, and should not be set aside, and, therefore, the complaint was properly dismissed. Although the bill of sale was absolute on its face, it was clearly intended as security for the debt by way of mortgage and not as a satisfaction thereof, and if this action had been to declare it as a mere security for the sum due and for an accounting of the proceeds of sale, it would have been maintained; but this action is founded on fraud to avoid the instrument altogether and for damages, as if no writing whatever had been executed or intended to be executed. The plaintiff is not entitled on the evidence in the case to the broad relief claimed. *Schelling v. Bischoff*, 68.

3. The property in question, consisting of gas fixtures, were leased by plaintiff to one Woolf on the conditional sale and installment plan, the title to remain in plaintiff until the fixtures

were paid for. While the property was in possession of Woolf he mortgaged the same to the defendant, who subsequently foreclosed the mortgage and disposed of the fixtures. The plaintiff brings suit to recover their value as for conversion. The defence is that defendant had no knowledge of the transaction between plaintiff and Woolf, and plaintiff having neglected to file the agreement providing that the title to the fixtures should remain in him until paid for, it became inoperative and void under Chapter 315, Laws of 1884. The Act cited, as amended in 1886, does not apply to "household goods." *Held*, that gas fixtures are "household goods" within the proper meaning of that term, which has been defined as more comprehensive than "furniture," and includes every article of personal property in the house or on the premises intended for ornament, use or consumption. *Iden v. Sommers*, 177.

4. The contention of the plaintiff in this case was that the colt "Huron" was sold "*with all his racing engagements*," among which was "The Futurity," and by means of such purchase of the colt, he became entitled to run the said colt in "The Futurity" race on August 29, 1891. At the time of the sale the colt was eligible as a competitor for "The Futurity." In the catalogue of sale the colt was described as "Eligible to Coney Island Futurity, 1891." Upon the verified complaint in the action the special term granted a mandatory injunction directing the defendant to permit a certain horse known as "Huron," the property of the plaintiff, to take part in a race called "The Futurity," on the 29th day of August, 1891. From the order granting the same this appeal is made. *Held*, that the sale of the colt as "Eli-

gible to Coney Island Futurity, 1891," in the description of the colt "Huron," when read in with the conditions of the sale, did not operate as a declaration by the vendor that the colt was sold with his racing engagements, and that representation of eligibility can hardly be held as one of the conditions of sale, and certainly it would be unreasonable to make the further claim that this description meant a sale of the colt, with all his engagements. If, however, under the facts and circumstances, it may be assumed that the plaintiff did purchase the colt "Huron" with his engagements, and succeeded to all the rights of General Jackson, the vendor, in respect to the colt and "The Futurity" race, and there was a question whether the plaintiff had or had not a right to run the said colt in the Futurity race of 1891, the executive committee of defendant were the final arbiters, and that committee decided that the said colt was not eligible to start in "The Futurity race of 1891," and that decision this court will not overturn. Executive committees of jockey clubs and social clubs are supreme within themselves, when acting within the scope of their recognized legal authority, and the courts will not interfere with their decisions when rendered in accordance with their powers and rights. The statutes of this State give the defendant the right to conduct races at certain specified times, and the right to settle controversies, like the one in question, is just as firmly established, and it has the support of sound principles of equity, declared in a long line of authorities. The executive committee of the corporation-defendant were fully warranted in the decision reached and in the course pursued. *Corrigan v. Coney Island Jockey Club*, 893.

## SLANDER.

The allegation of the complaint was to the effect that defendant had said of the plaintiff that he had robbed him of four hundred dollars. At the close of the plaintiff's case the evidence did not warrant more than an inference that defendant had said that the plaintiff had robbed him of twelve hundred dollars. Leave to amend the complaint so as to conform the same to the proof was denied, and the complaint was dismissed because of variance. *Held*, to be error, as a variance between an allegation in a pleading and the proofs is not material unless it has actually misled the adverse party to his prejudice. *Miller v. Holmes*, 245.

## STAY OF PROCEEDINGS.

1. The Supreme Court action was commenced first. If that action is stayed the defendant here, who is the plaintiff there, can use only a small portion of his demand, and may be compelled to renew his litigation for the balance; but if the Supreme Court action is tried first, the entire amount of defendant's demand will be litigated and disposed of. The law does not encourage double trials and multiplicity of suits, and the court will stay one action and allow the other in which entire relief may be awarded to proceed. Defendant's motion for a stay granted. *Dolbeer v. Stout*, 172.
2. Stay of proceedings in one action where two actions have been commenced, in both of which it is claimed the parties are the same, and the entire relief sought in the one case can be obtained in the other. *Held*, that the order of the special term, denying a stay, should be affirmed upon the opinion of the

judge thereof. *Smith v. College of St. Francis Xavier*, 363.

## STREETS AND HIGHWAYS.

*Absolute injunction requiring defendants to take down portion of elevated railway station projecting into side street—Strict construction of statutes authorizing elevated railway structure in certain streets—When projection of two feet beyond house line into side street not too trifling to justify injunctive relief. See Adler v. Met. El. Ry. Co., 85.*

## TRIAL.

1. Where a court has on a former appeal in the same case examined and decided questions in a case, it will not on a second appeal re-examine the questions or change or modify its former decision upon the same state of facts. *Griggs v. Day*, 124.
2. In this case, at the last trial, the parties stipulated that the evidence introduced upon the former trial, as printed in the case upon the former appeal, should be the evidence of the parties on the second and new trial. *Held*, that all objections and exceptions to the admission or exclusion of evidence, as the same appeared in said case, were waived, and, therefore, no exceptions to the admission or exclusion of evidence were taken by either party on the new trial. *Ib.*
3. *Held also*, that the evidence as thus submitted supports the findings of fact made by the referee, and the findings of fact fully sustain the conclusions of law made thereon. The referee has given proper effect to the rulings made on the former appeal so far as they are applicable, and no exception appears on either side that calls for a reversal or modification of the judgment,

and these appeals should be affirmed on the opinion and supplemental opinion made and filed by the referee. *Ib.*

4. In this case the controlling question before the court and jury was whether the accident was caused by the negligence of Burke, the driver of the carriage, in which plaintiff was riding, or the negligence of the railroad company. The negligence of the driver could not be imputed to the plaintiff. From the facts in evidence in the case the jury might have found that the driver and the railroad company were both negligent, but the question of their joint negligence was not sent to or placed before the jury, and the plaintiff did not have the benefit of the finding of the jury whether each was partly negligent, and, therefore, both jointly negligent, and for this reason a new trial was ordered. *Collins v. Long Island R. R. Co.*, 154.
5. The Supreme Court action was commenced first. If that action is stayed the defendant here, who is the plaintiff there, can use only a small portion of his demand, and may be compelled to renew his litigation for the balance; but if the Supreme Court action is tried first, the entire amount of defendant's demand will be litigated and disposed of. The law does not encourage double trials and multiplicity of suits, and the court will stay one action and allow the other in which entire relief may be awarded to proceed. Defendant's motion for a stay granted. *Dolbeer v. Stout*, 172.
6. In an action to recover damages for alleged wrongful discharge, each side at the conclusion of the evidence moved for the direction of a verdict in its favor. The trial judge thereupon directed a verdict in favor of the defendant. *Held*, that the request of each side operated to give the judge the office of the

jury, and that as the evidence was not conclusively in favor of the plaintiff, the disposition of the case by the trial judge was final. *Burrows v. Atlas S. S. Co.*, 206.

7. The motion for a new trial was made on the minutes of the trial judge, upon the ground specified in section 999 of the Code, but the trial had been before a judge, without a jury, by consent of parties. Section 999 applies only to jury trials, and the order appealed from must, therefore, be affirmed irrespective of the reasons for which it was made. *Knight v. Sackett & Wilhelms L. Co.*, 219.

8. In an action tried by the court without a jury, *Held*, that the complaint was properly dismissed; but as the dismissal was upon plaintiff's own showing, and without findings, it should not have been dismissed "upon the merits," the judgment should be modified by striking out the words "upon the merits." *Knight v. Sackett & Wilhelms L. Co.* 219.

9. In this case the conflict between the witnesses of the respective parties was quite marked, and the result depended upon the credibility of the witnesses in the judgment of the referee. Upon the case as presented on this appeal the court would not be justified in interfering with the decision of the referee on the ground that his findings were against the weight of evidence. Nor is there any merit in the claim that some of the facts found by the referee are not supported by the evidence. The facts being so found from the evidence, they support the conclusion of law based thereon, in conformity with which the judgment was entered. *Seggermann v. Hillis Plantation Coffee Co.*, 233.

10. The allegation of the complaint was to the effect that defendant

had said of the plaintiff that he had robbed him of four hundred dollars. At the close of the plaintiff's case the evidence did not warrant more than an inference that defendant had said that the plaintiff had robbed him of twelve hundred dollars. Leave to amend the complaint so as to conform the same to the proof was denied, and the complaint was dismissed because of variance. *Held*, to be error, as a variance between an allegation in a pleading and the proofs is not material unless it has actually misled the adverse party to his prejudice. *Miller v. Holmes*, 245.

11. This appeal is from a judgment entered upon the order of the court at special term, after an exhaustive trial, dismissing the complaint. *Held*, that the complaint sets forth a good cause of action, and the right of the plaintiffs to recover depended entirely upon the evidence, and the most that can be said on behalf of plaintiffs is that there was a conflict of evidence. The trial court, on the questions of fact, found adversely to plaintiffs, and its conclusions are fully sustained by a preponderance of evidence, and the judgment appealed from is affirmed. *Michel v. Colegrove*, 275.

12. In an application to vacate a judgment and suppress the deposition of a witness on the ground of newly-discovered evidence, the motion was founded upon affidavits. The court below held that such a motion should be made upon a case and exceptions, as well as the affidavits, and therefore denied the motion with leave to renew upon such case. *Held*, that the court below correctly indicated the practice to be followed in such a case, and that the order was properly granted. *Michel v. Colegrove*, 278.

13. This motion to vacate a judg-

ment and to suppress the deposition of a witness taken by commission made upon a case and exceptions and affidavits is based on the fact that defendants before the execution of the commission had sent the witness a copy of the interrogatories with the answers desired. Upon the trial defendants prevailed. *Held*, that the action of defendant in regard to the execution of the commission, taking the testimony of one Battelson in the case, indicates a disregard of the proprieties that all honorable men observe in the conduct of any litigation, however bitter, and is a trespass upon the code of ethics, which should control under such circumstances, and calls for severe condemnation by this court. The conduct of the defendant in this respect is inexcusable. But from a careful examination of all the evidence it does not appear that such action was a wrong from which defendant derived any benefit, and, therefore, his conduct does not afford sufficient ground or reason to entitle the motion to prevail. *Michel v. Colegrove*, 280.

14. *Held*, that the plaintiffs are estopped from the relief sought, by reason of their *negligence and laches*. The testimony of the witness was not controlling, it was only cumulative, and there is enough in the case, without the testimony of this witness, to sustain the judgment. A new trial cannot be obtained either for the purpose of furnishing new and additional cumulative evidence, nor for the purpose of destroying the cumulative evidence of the successful party. This rule is well settled, that if a witness examined on commission is instructed by the party in interest how to testify, the commission will be suppressed at the instance of the adverse party, on the ground that such conduct is prejudicial to him, corrupting to

the witness, an abuse of process and a fraud on the court, interfering with pure administration of justice. But suppressing a commission in advance of the trial and granting a new trial after judgment are quite different things. A judgment is intended to terminate a litigation and to conclude the parties as to every question raised or which might have been raised before the final result was reached, and rights so lost may never be regained. *Ib.*

15. *Held*, that defendant could not have the benefits of a valid contract without bearing its burdens. She could not be permitted to affirm in part, and rescind in part. The trial judge properly compelled the defendant to elect either to stand on her alleged counter-claim and affirm the contract, or to abandon the counter-claim and stand upon the alleged facts as a defence. The offered evidence of preparations made by defendant was properly excluded. The only theory on which such evidence might be admissible is that it would show defendant's belief in the representations made. But no representation is available for that purpose unless it is a representation as to an existing material fact, and the representations relied upon for rendering the excluded evidence admissible related to mere expectations and not to existing material facts. If defendant wished to rely upon the representations of expectations which she claimed the plaintiff's committee made to her, she should have exacted a guaranty of the number to be present or a guaranty of profits. *Societa Italiana, etc. v. Sulzer*, 325.

16. After the issues herein were referred to a referee, the defendants served an amended answer to which plaintiff served a reply. No notice of trial was served

after issue joined on the amended answer. The defendants objected to proceeding before the referee at the opening of the trial, on the ground that the issues to be tried were not made until a date subsequent to the order of reference. The referee proceeded with the trial and rendered a report in the plaintiff's favor. *Held*, that defendants were debarred from raising this question by their own laches in not seeking relief by motion to vacate the order of reference and proceedings held before the referee, prior to the presentation of their defence. *Degener v. Underwood*, 451.

*Order for the examination of defendant as a witness before trial on the part of plaintiff, under sections 870, 871, and 872 of the Code. See Douglass v. Meyer*, 869.

*Trial—Defendants should not be allowed to prove their defence on the cross-examination of plaintiff before plaintiff rests. See Lange v. Manhattan Ry. Co.*, 455.

### TRUSTS.

The object of this action was to obtain a judgment of this court, to the effect, that certain pieces of real estate, the title to which, at the time of the death of Isaac L. Pinckney, stood in the name of his widow, Henrietta Pinckney, were equitably a part of the estate of Isaac L. Pinckney when he died. These pieces had been duly conveyed to Henrietta Pinckney at the request of her husband, who paid the consideration for the same. The plaintiffs claimed that the conveyances in question created a trust in said Henrietta Pinckney to consider and treat and dispose of the same, as the property and estate of Isaac L. Pinckney, under his last will and testament,

in which he appointed the said Henrietta as sole executrix. The plaintiffs also claimed that said Henrietta Pinckney had accepted such grants on her promise that she should hold the said real estate in trust and not as her own absolute property. The court held that no promise had been proved, and that if it had been so proved it would have been void, as also would have been the so-called and claimed trust. That if such an oral promise or oral trust had been established, it would not have been fraud on the part of the grantee to have refused to recognize the validity of either. The inference from the whole testimony in the case is, that Isaac L. Pinckney did intentionally what he did do, or cause to be done, in regard to the conveyances, intending and meaning that his action in the premises should have its full legal effect. *Watson v. Pinckney*, 188.

### UNDUE INFLUENCE.

See FRAUD, 2.

### UNITED STATES COURTS.

1. The jurisdiction of the Supreme Court of the District of Columbia, and the validity of its decrees, must be determined by the laws of the United States, and the construction and interpretation of the same by the Supreme Court of the United States. *Hovey v. Elliott*, 409.
2. In this case the referee found that the decree in question was invalid for want of jurisdiction of the said Supreme Court of the District of Columbia to enter the same. *Held*, that the referee reached the right conclusion, and the judgment is affirmed upon the opinion of the referee relating to the question of jurisdiction of said court. *Ib.*

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VARIANCE.

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VERDICT.

In an action to recover damages for alleged wrongful discharge, each side at the conclusion of the evidence moved for the direction of a verdict in its favor. The trial judge thereupon directed a verdict in favor of the defendant.

*Held*, that the request of each side operated to give the judge the office of the jury, and that as the evidence was not conclusively in favor of the plaintiff, the disposition of the case by the trial judge was final. *Burrows v. Atlas S. S. Co.*, 205.

WARRANTY.

*Mandatory injunction—Sale of a race-horse with all his racing engagements, and sale of same on a statement that he was "eligible" for certain races considered. See Corrigan v. Coney Island Jockey Club*, 893.

WITNESS.

See DEPOSITION.

*E. x. R. B. 51*







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